TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 275. 59.

A. J. TULLOCK, PLAINTIFF IN ERROR,

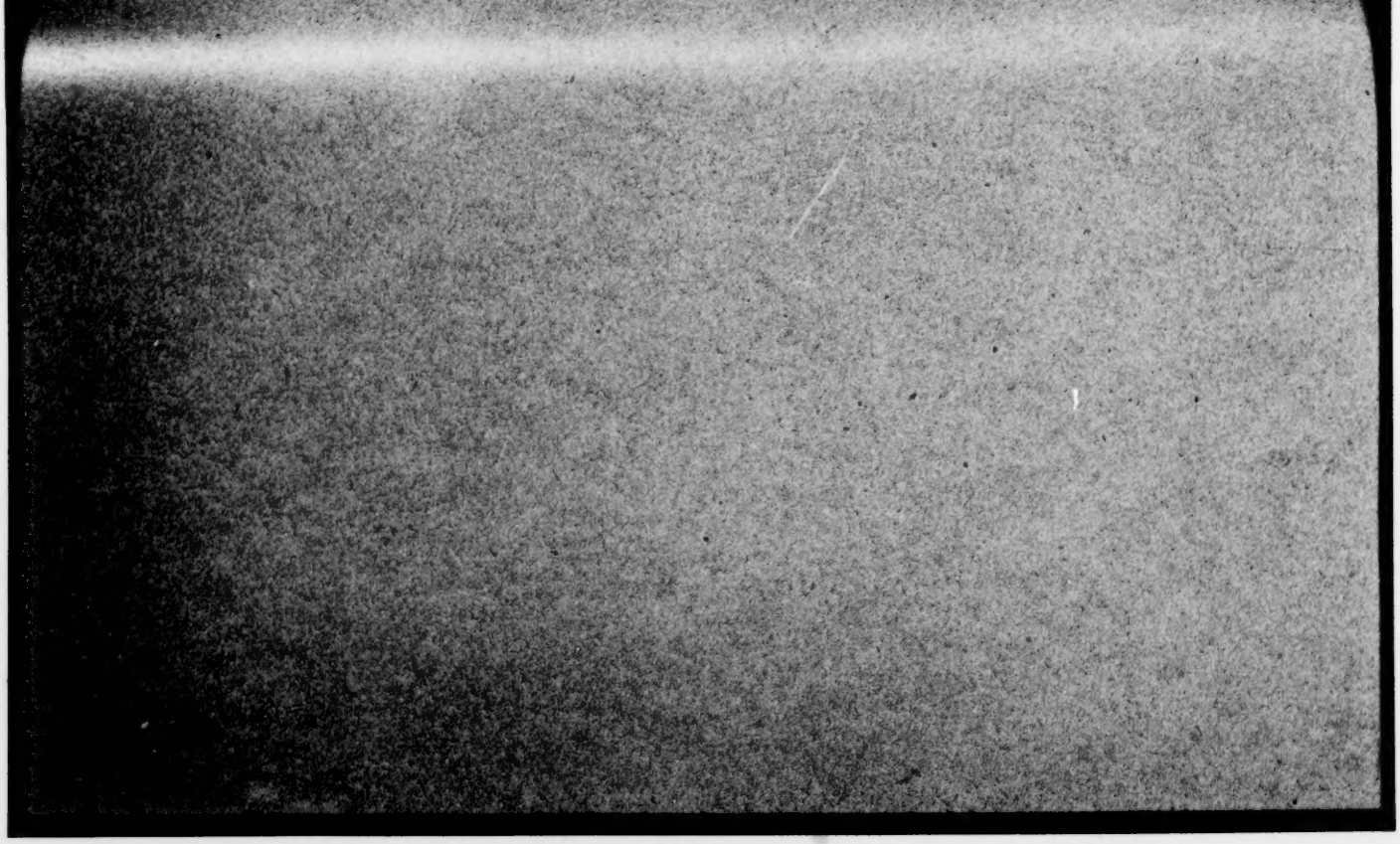
vs.

JOAB MULVANE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

FILED MAY 10, 1900.

(17,750.)



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In the Supreme Court of the State of Kansas.

A. J. TULLOCK, Plaintiff in Error, vs. JOAB MULVANE, Defendant in Error. } No. 11318.

Be it remembered that on the 23rd day of November, 1898, there was filed in the office of the clerk of the supreme court of the State of Kansas a petition in error, with a waiver of the issuance and service of summons in error endorsed thereon, and with a case-made attached thereto and made a part thereof, which are in the words and figures as follows, to wit:

2 A. J. TULLOCK, Plaintiff in Error, vs. JOAB MULVANE, Defendant in Error. } 11318.

Petition in Error and Case-made.

Filed November 23, 1898.

JNO. MARTIN,
Clerk Supreme Court.

3 In the Supreme Court of the State of Kansas.

A. J. TULLOCK, Plaintiff in Error, vs. JOAB MULVANE, Defendant in Error. } No. —.

Petition in Error.

Comes now A. J. Tullock, the above-named plaintiff in error, and complains of the above-named defendant in error, Joab Mulvane, and alleges that at the April term, 1898, of the district court of the third judicial district of the State of Kansas said defendant in error obtained a judgment against this plaintiff in error in a certain action then pending in said district court, wherein this plaintiff in error was defendant and said defendant in error was plaintiff. The original case-made in said action, duly certified, is hereto attached, marked Exhibit A, and made a part of this petition in error.

And this plaintiff in error alleges that in the proceedings of said district court in said cause there are material and substantial errors prejudicial to the rights of this plaintiff in error, and that said errors are disclosed in said original case-made, in this, to wit:

1. That said district court admitted incompetent, irrelevant, and immaterial evidence in the trial of said cause, over the objections and exceptions of the defendant in said cause.

2. That in said trial said district court refused to admit competent, relevant, and material evidence which was offered by the defendant in said cause; to each of which refusals and rulings of the court the defendant in said cause objected and excepted at the time.

3. That in said trial said district court erred in giving to the jury certain instructions; to all of which the defendant in said cause objected and excepted at the time.

4. That in said trial said district court erred in refusing to give to the jury certain instructions requested by the defendant in said cause; to which refusal said defendant objected and excepted at the time.

5. That in said trial said district court erred in allowing, as an element of damage, attorneys' fees paid for legal services rendered in the case of Wescott & Hanson *vs.* Mulvane *et al.*, in the United States circuit court for the district of Kansas; to which ruling of the court the defendant in said cause objected and excepted at the time.

6. That said district court erred in overruling the motion of the defendant in said cause for a new trial; to which ruling said defendant objected and excepted at the time.

7. That said district court erred in rendering judgment in favor of the plaintiff in said cause and against the defendant therein.

8. That in said trial said district court erred in its rulings in matters of law; to each of which rulings the defendant objected and excepted at the time.

Wherefore this plaintiff in error prays that said judgment of said district court may be reversed and set aside, and that he be restored to all things which he has lost by reason thereof.

ROSSINGTON, SMITH & DALLAS,
CLIFFORD HISTED,
Attorneys for Plaintiff in Error.

We do hereby waive the issuance and service of summons in error in the above-entitled action.

Topeka, Kansas, November 19th, 1898.

A. L. WILLIAMS &
N. H. LOOMIS,
Attorneys for Defendant in Error.

4 EXHIBIT A.

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5 In the District Court of Shawnee County, Kansas.

JOAB MULVANE, Plaintiff,
vs.
A. J. TULLOCK, Defendant. } No. 17012. Case-made.

Be it remembered that on the 5th day of November, 1892, there was filed in the office of the clerk of the circuit court of Shawnee county, Kansas, a petition, which is in words and figures as follows, to wit:

In the Circuit Court of Shawnee County, Kansas.

JOAB MULVANE, Plaintiff,
vs.
A. J. TULLOCK and W. M. D. LEE, Defendants.

Petition.

Plaintiff alleges that upon or about the 13th day of February, 1890, in an action pending in the circuit court of the United States for the district of Kansas wherein George P. Wescott and Samuel Hanson were complainants and Joab Mulvane, the plaintiff above mentioned, and others were defendants, a temporary injunction was issued out of the said court and served upon said defendants enjoining them from putting on record any deed or conveyance to the franchises and property of the water works of the city of Topeka, Shawnee county, Kansas, which upon the 14th day of December, 1889, were owned, controlled, and operated by the said Topeka Water Supply Company; also from signing, sealing, or negotiating any bonds which were proposed to be issued by the Topeka Water Company, a new corporation to be organized for the purpose of owning, controlling, and operating the said water works, and from carrying on any negotiations with reference to said bonds in the way of executing, delivering, or putting said bonds upon the market or requesting the trustee named in said bonds to certify to said bonds or from requesting said trustee to act in any matter in connection with the scheme or enterprise looking to the formation of the Topeka Water Company and its acquirement of the franchise of the Topeka Water Supply Company; also from selling any of the capital stock of said Topeka Water *Supply* Company or of said Topeka Water Supply Company; also from offering said stock of the Topeka Water Supply Company or the Topeka Water Company upon the market, or from cancelling any of the stock of the said Topeka Water Supply Company, or from turning over the books of said Topeka Water Supply Company, or from in anywise impairing, affecting, or terminating the active existence of said Topeka Water Supply Company as the owner and operator of said works, or from delivering or assigning any of the stock of the Topeka Water Company to any person or persons whatsoever.

Plaintiff further alleges that said temporary injunction was allowed by said court upon condition that the complainants therein should give bond to the defendants therein, in accordance to law, in the sum of seventy-five thousand dollars; that afterwards the said circuit court of the United States made an order allowing complainants to deposit with the clerk of said court the sum of seventy-five thousand dollars cash in lieu of the bond required to be given as aforesaid, which cash deposit was made by said complainants with the clerk of said court; that thereafter complainants were allowed by the court to withdraw said cash deposit upon their giving a bond in lieu thereof.

Plaintiff further alleges that in accordance with said order of said

circuit court of the United States said complainants gave to said Joab Mulvane and his codefendants in that suit a bond signed by said George P. Wescott and Samuel Hanson, as principals, and A. J. Tullock and W. M. D. Lee, the defendants in this case, as sureties. Said bond is in words and figures as follows:

6 Know all men by these presents that we, George P. Wescott, of Portland, Maine, and Samuel Hanson, of Boston, Massachusetts, hereby constitute and appoint Rossington, Smith & Dallas, of Topeka, Kansas, our true and lawful attorney, for us and each of us, in our names and stead, to sign, execute, and deliver for us, as principals, a certain injunction bond for the penal sum of seventy-five thousand dollars, dated May 23, 1890, with A. J. Tullock and W. M. B. Lee, as sureties, in a certain cause pending in the circuit court of the United States at said Topeka, wherein we are complainants and Mulvane and others are defendants, and we hereby adopt and confirm the signing of said bond, as above already done, and agree to be bound thereby fully as if made by ourselves, and do hereby declare that our said attorneys had full power and authority in the premises.

Hereby granting our said attorneys full power and authority to act in and concerning the premises as fully and effectually as we might do if personally present, and we do hereby fully confirm and adopt all acts done for us and in our respective names by our said attorneys in the premises prior to the actual execution of these presents by us.

In witness whereof we hereto set our hands and seals May 28, 1890.

GEO. P. WESCOTT.
SAML HANSON. [SEAL.]

MASSACHUSETTS, *Suffolk*, } ss:

AT BOSTON, *May* 28, 1890.

Personally appeared said Samuel Hanson, to me known, and acknowledged the foregoing instrument by him subscribed to be his free act and deed.

Before me—

JOHN R. BALLARD,
Notary Public. [SEAL.]

MAINE, *Cumberland*, } ss:

AT PORTLAND, *May* 28, 1890.

Personally appeared said George P. Wescott, to me known, and acknowledged the foregoing instrument by him subscribed to be his free act and deed.

Before me—

NATHAN CLEAVES,
Notary Public. [SEAL.]

Know all men by these presents that we, George P. Wescott and Samuel Hanson, as principals, and A. J. Tullock and W. M. D. Lee, of Leavenworth, Kansas, as sureties, are held and firmly bound unto Joab Mulvane, the Topeka Water Supply Company, a corporation; the Topeka Water Company, a corporation; William Edward Coffin, Walter Stanton, Charles H. Jackson, and Charles F. Street, partners doing business under the firm name and style of Coffin & Stanton, and the Atlantic Trust Company, a corporation, in the sum of seventy-five thousand dollars, lawful money of the United States; for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

The condition of the above obligation is such that whereas in a certain suit pending in the circuit court of the United States for the district of Kansas, wherein the said George P. Wescott and Samuel Hanson are complainants and the said Joab Mulvane, The Topeka Water Supply Company, The Topeka Water Company, William Edward Coffin, Walter Stanton, Charles H. Jackson, and Charles F. Street, partners doing business under the firm name and style of Coffin & Stanton, and The Atlantic Trust Company are defendants, a temporary restraining order was upon the filing of a bill in said suit granted and issued against said defendants, and afterwards and on the 13th day of February, 1890, it was ordered by said court that upon said complainants giving a bond, to be approved by the court, in the sum of seventy-five thousand dollars, within two days thereafter, conditioned that the said complainants should pay all damages to the said defendants against whom said injunction was granted, resulting from the granting of said restraining order and said injunction, provided that it should be ultimately held that the
7 said injunction or said restraining order were unlawfully granted, a temporary injunction should be granted and issued in said suit in favor of said complainants and against said defendants, Joab Mulvane, The Topeka Water Supply Company, and The Topeka Water Company; and whereas within the period, as aforesaid, limited for the giving of said bond the said complainants applied to the court for an order to deposit with the clerk of said court in lieu of the bond, as aforesaid, the sum of seventy-five thousand dollars in cash, which said order was granted, and said sum of seventy-five thousand dollars in cash was thereupon deposited with said clerk, and said money was so received in lieu of said bond, and thereupon said temporary injunction issued as upon a bond being given; and whereas upon the application of said complainants, as aforesaid, for leave to substitute a bond for said cash deposit, as aforesaid, leave was granted to give a bond to be approved by the court, and upon approval thereof said complainants should be permitted to withdraw said cash deposit in the hands of the clerk; and whereas before the filing and approval of said bond last as aforesaid the said injunction so as aforesaid allowed was, upon motion of certain defendants herein, by one of the judges of said court dissolved;

Now, therefore, if the said George P. Wescott and Samuel Hanson shall pay or cause to be paid to the said Joab Mulvane, the Topeka

Water Supply Company, the Topeka Water Company, William Edward Coffin, Walter Stanton, Charles H. Jackson, and Charles F. Street, partners, doing business under the firm name and style of Coffin & Stanton, and the Atlantic Trust Company and to each of them all damages which they or either of them have already sustained or may at any time sustain by reason of the granting or issuing of said restraining order or the granting and issuing of said temporary injunction, if it shall be finally decided that said restraining order or said temporary injunction ought not to have been granted, or the withdrawing from the hands of the clerk the said sum of seventy-five thousand dollars deposited in lieu of the bond as required by the court to be given, then the above obligation shall be null and void; otherwise shall be and remain in full force and effect.

In witness whereof we have hereunto set our hands this 23d day of May, A. D. 1890.

A. J. TULLOCK.
W. M. D. LEE.
GEORGE P. WESCOTT.
By ROSSINGTON, SMITH & DALLAS,
His Attorneys.
SAMUEL HANSON.
By ROSSINGTON, SMITH & DALLAS,
His Attorneys.

Approved May 24, 1890.

C. G. FOSTER, *Judge.*

STATE OF MISSOURI, }
County of Jackson, }

A. J. Tullock, being first duly sworn, deposes and says that he is worth, over and above all debts, exemptions, and liabilities, the sum of seventy-five thousand dollars and further affiant saith not.

A. J. TULLOCK.

Subscribed and sworn to before me this 23d day of May, 1890.

HARRY G. CRAIN,
Notary Public, Jackson Co., Mo. [SEAL.]

Commission expires June 17th, 1891.

STATE OF MISSOURI, }
County of Jackson, } *ss:*

W. M. D. Lee, being first duly sworn, deposes and says that he is worth, over and above all debts, exemptions, and liabilities, the sum of seventy-five thousand dollars; and further affiant saith not.

W. M. D. LEE.

Subscribed and sworn to before me this 23d day of May, 1890.

HARRY G. CRAIN,
Notary Public, Jackson Co., Mo. [SEAL.]

Commission expires June 17th, 1891.

Endorsed: "No. 6448. George P. Wescott *et al. vs.* Joab Mulvane *et al.* Injunction bond. Filed June 3, 1890. Geo. F. Sharitt, clerk."

8 Plaintiff further alleges that said bond was approved by the said court and the said cash deposit of seventy-five thousand dollars withdrawn by said complainants from the clerk of said court.

Plaintiff further alleges that such further proceedings were had in the said suit pending in the circuit court of the United States for the district of Kansas that it was finally decided that the said temporary injunction was unlawfully issued and that the said complainants were not entitled to the said injunction. (See page 257 of this case-made for amendments to petition to be here inserted.)

Plaintiff further alleges that he has suffered damages caused by the issuance of said injunction in the sum of seventy-five thousand dollars, for which sum of money he prays judgment.

A. L. WILLIAMS,
N. H. LOOMIS, AND
R. W. BLAIR,
Attorneys for Plaintiff.

To the clerk of said court:

Please issue summons in the above-entitled case, directed to the sheriff of Shawnee county, and make returnable in accordance to law. Suit brought to recover $75,000.00, damages.

A. L. WILLIAMS,
N. H. LOOMIS, AND
R. W. BLAIR,
Attorneys for Plaintiff.

Afterwards and on the 8th day of April, 1893, there was filed in the office of the clerk of said circuit court, by and with the written consent of the plaintiff's attorneys, an answer of the defendant A. J. Tullock, which is in words and figures as follows, to wit:

"In the Circuit Court of Shawnee County, Kansas.

JOAB MULVANE, Plaintiff,)
vs.) Answer of the Defendant
A. J. TULLOCK ET AL., Defendants.) A. J. Tullock.

Now comes said defendant, A. J. Tullock, and for answer to the petition of the plaintiff filed herein says:

I. That he denies each and every, all and singular, the allegations and averments in said petition contained.

II. And for a second and further ground of defense to said petition said defendant says that he admits the execution of the bond in said petition contained, but denies that said bond has become absolute or any liability has accrued to this defendant thereon.

And said defendant, further answering, says that on the 26th day of September, 1892, in the said cause referred to in the petition

herein, being the suit of Wescott and Hanson *vs.* Mulvane, in the circuit court of the United States for the district of Kansas, a decree was entered dismissing the bill of complaint of the said Wescott and Hanson; that thereafter and on the 19th day of December, 1892, and within the time allowed by law, the said Wescott and Hanson, complainants in said bill, filed their certain assignments and specifications of error in said cause and prayed the allowance of an appeal therein to the United States circuit court of appeals, which was thereupon by the court allowed and a supersedeas bond fixed at $1,000; that among the assignments of error made by the said Wescott and Hanson in said cause was the order of the said United States circuit court dissolving the temporary injunction theretofore issued in said cause; that in pursuance of the allowance of said appeal a supersedeas bond has been duly filed by the said Wescott and Hanson and duly approved in said cause, and citation has been issued therein and served upon the said Joab Mulvane, the plaintiff herein and defendant in said cause; that a duly certified transcript of the record and proceedings in said circuit court has been filed in the United States circuit court of appeals for the eighth circuit within the time and in the manner prescribed by law, and said cause is now pending upon appeal of the said Wescott
9 and Hanson in said last-mentioned court.

Wherefore said defendant prays that he may go hence without day and recover his costs herein. (See page 256 of this case-made for amendments to answer made during trial.)

ROSSINGTON, SMITH AND DALLAS,
Attorneys for Defendant A. J. Tullock."

Afterwards and on the 18th day of April, 1893, there was filed in the office of the clerk of said circuit court a reply, which is in words and figures as follows, to wit:

"In the Circuit Court of Shawnee County, Kansas.

JOAB MULVANE, Plaintiff,)
vs.
A. J. TULLOCK ET AL., Defendants.)

Reply.

1. Now comes the above-named plaintiff, and for reply to the answer of the defendant Tullock, filed herein, denies each and every allegation thereof inconsistent with the allegations of plaintiff's petition.

2. For further reply to said answer, plaintiff denies that in said cause pending in the United States circuit court for the district of Kansas the court fixed the amount of a supersedeas bond at $1,000, as set forth in defendant's answer, and alleges the fact to be that the supersedeas bond fixed by the court in said cause was to supersede the decree for costs only, and is so stated in the decree rendered therein; and plaintiff further alleges that the bond filed in said

cause and referred to in defendant's answer is a bond to supersede the decree for costs in said cause only, and plaintiff denies the execution of any supersedeas bond, as alleged in defendant's answer.

WILLIAMS AND DILLON,
N. H. LOOMIS, AND
R. W. BLAIR,
Attorneys for Plaintiff.

STATE OF KANSAS,)
Shawnee County,) ss:

N. H. Loomis, being duly sworn, says that he is one of the attorneys for the plaintiff in the above-entitled cause, and that the allegations contained in the second paragraph of the foregoing reply are true, as he verily believes.

N. H. LOOMIS.

Subscribed and sworn to before me this 17th day of April, 1893.
[SEAL.] FRANK E. SMITH,
Notary Public.

My commission expires Feb. 27, 1894."

Afterwards and on the 4th day of February, 1895, said cause came regularly on for trial in said circuit court, was tried, and judgment rendered therein. An appeal was taken from the judgment of said circuit court to the supreme court of the State of Kansas, and the opinion of the supreme court in said case is reported in 58 Kan., at page 622. The mandate of the supreme court ordering a new trial of said cause was received with a copy of said opinion and filed in the office of the clerk of the district court of Shawnee county, Kansas, on the 29th day of November, 1897. Motion of the plaintiff to spread said mandate of record was duly made and the same was duly spread of record, as more fully appears from the following copy of an entry which was made upon the journal of the court in words and figures as follows, to wit:

"In the District Court of Shawnee County, Kansas.

JOAB MULVANE, Plaintiff,
vs.) No. —.
A. J. TULLOCK and W. M. D. LEE, Defendants.)

Upon this 24th day of January, 1898, comes Joab Mulvane, plaintiff, by Williams & Dillon, his attorneys, and presents to the court the mandate of the supreme court of the State of Kansas in
10 the above-entitled cause, directing a reversal of the judgment of the lower court herein and ordering a new trial of said cause, and upon motion of plaintiff it is ordered that said mandate be spread upon the records of this court; that the judgment heretofore rendered herein by the circuit court of Shawnee county, Kansas, be, and the same is hereby, reversed and set aside and plaintiff granted a new trial in accordance with the mandate of the supreme

court, and the clerk of this court is hereby directed to enter said cause upon the trial docket for hearing.

Z. T. HAZEN, *Judge.*

O K.

A. L. WILLIAMS,
Attorneys for Plaintiff.
ROSSINGTON, SMITH & DALLAS,
Attorneys for Defendant A. J. Tullock."

Afterwards and on Thursday, the 16th day of June, 1898, this action came regularly on for trial. The plaintiff appeared in person and by A. L. Williams and N. H. Loomis, his attorneys, and the defendant appeared by Rossington, Smith & Dallas and Clifford Histed, his attorneys. A jury was duly and regularly called and sworn, as required by law, to try the case, and a preliminary statement was made to the jury on behalf of each party in interest. Thereupon the plaintiff, to maintain the issues upon his part, produced and offered evidence as follows:

Mr. LOOMIS: We offer in evidence the whole record in the case of George P. Wescott and Samuel Hansom *vs.* Joab Mulvane, No. 230, pending in the U. S. court of appeals from the U. S. circuit court for the district of Kansas. This record is enclosed in the case-made in the supreme court of the State of Kansas in the case entitled Joab Mulvane, plaintiff in error, *vs.* A. J. Tullock, defendant in error, being No. 10214.

Mr. HISTED: The defendant objects to the admission of the order of the court dismissing the appeal as against the Topeka Water Supply Company and the two water companies on pages 102 and 103 of the record as incompetent, irrelevant, and immaterial, and if it is offered for the purpose of showing a termination of the injunction suit which could authorize the bringing of this action on the bond, it is insufficient for that purpose and is a variance from the allegations of the petition with reference to the termination of the injunction suit, and for the reason that it does not appear there to have been finally decided that said injunction ought not to have been granted, that being the allegation in the petition.

The COURT: It is part of the record in this case?

Mr. HISTED: Yes, sir.

The COURT: I think the entire record is admissible; the objection will be overruled, because I think the entire record is competent. The defendant excepted to the ruling of the court. Said record is hereto attached, marked Exhibit A, and made a part of this case-made.

Mr. LOOMIS: In connection with this I offer in evidence the opinion of the United States court of appeals in this case based upon the record which has been introduced in evidence. It is found on page 13 of the record of the supreme court of the State of Kansas in the case entitled Joab Mulvane against A. J. Tullock, No. 10214.

Mr. HISTED: We object to the opinion as incompetent, irrelevant, and immaterial and because it is a matter that occurred subsequent to this suit and could not affect the rights of the parties here.

The COURT: Upon what theory is that competent?

Mr. LOOMIS: As part of the whole case and also upon this propo
sition: The court of appeals holds in that case that the dismissal
that portion of the case relating to the specific performance of th
contract amounted to a dismissal of the injunction part of the pr
ceedings at that time, and therefore that the ruling of the cou
below was final upon the question as to whether an injunction wa
properly granted or not.

11 The COURT: The objection will be sustained; I don't thin
the opinion is competent. I take it that the fact that th
temporary injunction was dissolved is conclusive upon that propos
tion, and when you have shown that the injunction was dissolve
that presumption will continue until the other side show that son
court has reversed that decision. I don't think the opinion of th
court is competent.

The plaintiff excepted to the ruling of the court.

Mr. LOOMIS: Now, if your honor please, I desire to call attentio
of the jury to portions of this record and read it to the jury, of cours
not the whole record, but some of the parts which bear more pa
ticularly upon it.

The COURT: Either party may read any portion of the recor
which he desires if there is no objection, but if there is objection
course the whole record will have to be read.

Mr. HISTED: We don't insist on that.

Counsel for the plaintiff read to the jury the following: Restrain
ing order, found on page fourteen of the printed record; temporar
injunction, found on page forty-one of the printed record; order f
cash deposit, found on page forty-two of the printed record; ord
for the clerk to turn over to the plaintiffs seventy-five thousand do
lars and bond for injunction having been substituted and filed; i
junction bond given, found on page ninety-three of the printed recor

Mr. LOOMIS: We offer in evidence the original injunction bond,
copy of which is found on page ninety-three of the printed recor
Said original injunction bond was marked A B for identification, wa
read to the court and jury, and is in words and figures the same
the copy thereof which appears on page ninety-three of the printe
record hereinafter set out. Counsel continued to read to the jur
from the printed record, as follows: Motion to dissolve, found on pag
seventy-six of the printed record; order dissolving the injunctio
found on page eighty-eight of the printed record.

Mr. HISTED: We object to that order for the reason that it wa
made by a judge at chambers out of the district, and he was ther
fore without jurisdiction.

The court overruled the objection; to which ruling the defenda
at the time excepted.

Counsel for plaintiff next read from the printed record the stipu
lation dismissing the equitable features of the bill, found on pag
one hundred — two of the printed record.

Mr. HISTED: We make the same objection to that, because ther
is a variance between that and the allegations in the petition in th
case.

The court overruled the objection; to which ruling the defendant at the time excepted.

Mr. Loomis: Now, I desire to read the decree entered by Judge Riner on the merits of the case. I will read from the original, which is also a part of the record, but there were some additions made afterwards, and it was claimed that it operated as a supersedeas, and I read the original to show that it was not intended as a supersedeas on the giving of a bond in that case. Said original decree was marked A C for identification, and is in words and figures as follows, to wit:

"In the Circuit Court of the United States for the District of Kansas.

George P. Wescott and Samuel Hanson, Plaintiffs,
vs.
Joab Mulvane, The Topeka Water Supply Company, The Topeka Water Company, William Edward Coffin, Walter Stanton, Charles Harvey Jackson, and Charles Fawset Street, Engaged in Business under the Firm Name and Style of Coffin & Stanton, and The Atlantic Trust Company, Defendants.

Decree.

12 This cause, having been heretofore dismissed as to all of the above-named defendants except the said Joab Mulvane, on this day came on to be heard upon the bill of complaint herein, the answer thereto of the said defendant, Joab Mulvane; the replication of the complainants to said answer, and the evidence taken and filed in said cause, and having been argued by counsel for the respective parties:

Now, therefore, on consideration thereof, it is ordered, adjudged, and decreed that the said complainants' bill of complaint be, and the same is hereby, dismissed with costs to the said defendant, Joab Mulvane, to be taxed.

Thereupon said complainants pray an appeal to the circuit court of appeals, which is allowed.

Thereupon, upon application of said complainant, supersedeas bond is fixed at the sum of $1,000.00 to supersede the decree for costs in this cause and appeal allowed.

JOHN A. RINER, *Judge.*"

Mr. Loomis: I now offer in evidence the mandate from the U. S. circuit court of appeals in this case.

Mr. Smith: We object to that because it was matter that occurred long subsequent to the commencement of this suit.

The Court: I don't think it is material, and the objection will be sustained.

The plaintiff excepted to the ruling of the court.

JOAB MULVANE, the plaintiff, called as a witness in his own behal being first duly sworn, testified as follows:

Direct examination.

Questions by Mr. LOOMIS:

Q. State your name to the jury.
A. Joab Mulvane.
Q. Where do you reside, Mr. Mulvane?
A. In the city of Topeka.
Q. How long have you lived here?
A. About twenty-two years.
Q. Are you the same Joab Mulvane who was one of the defend ants in the case pending in the United States circuit court for th district of Kansas, in which Wescott & Hanson were complainant and Joab Mulvane, The Topeka Water Supply Company, The Topek Water Company, Coffin & Stanton, and others were defendants?
A. I am.
Q. When did you first receive notice that suit was brought agains you with reference to the time that the restraining order was serve upon you in that case?
A. You mean notice of the restraining order?
Q. Yes, sir; when, with reference to the time that you learned tha suit was brought?
A. I think I received service on the 5th of February, 1890.
Q. When did you first learn that the suit was brought agains you?
A. That was the first, I think, that I had of the suit.
Q. The service of the restraining order?
A. Yes, sir.
Q. At that time did you have a contract with Coffin & Stanton an Woodbury & Moulton for the conveyance of the capital stock of th Topeka Water Supply Company?
A. I did.
Q. And this restraining order prevented you from carrying ou that contract?

Counsel for the defendant objected to the question as calling fo that which is not the best evidence and for incompetent, irrelevan and immaterial testimony. The court sustained the objection; t which ruling the plaintiff at the time excepted.

Q. After the restraining order was served upon you what did yo do to prevent the allowance of a temporary injunction in the case?
A. I immediately employed attorneys.
Q. Who was the first attorney you employed?
A. Mr. J. D. McFarland, is my recollection.
Q. For what purpose did you employ him?
13 A. To dissolve or prevent the granting of a temporary in junction and to dissolve it if granted.
Q. What other attorney, if any, did you employ?
A. Hurd and Dunlap, Mr. Eugene Hagan, and Mr. A. L. William

Q. Was Mr. Williams employed before the temporary injunction was granted or afterwards?

A. Afterwards.

Q. The Hurd & Dunlap that you refer to, were they connected in anywise or were they the same gentlemen who were connected with the Santa Fé law department?

A. Yes, sir.

Q. What are Mr. Hurd's initials?

A. A. A., is my recollection.

Q. What was his connection with the Santa Fé law department at that time?

A. He is at the head of the law department for this State, and I don't know whether further than that or not.

Q. Was Mr. Dunlap the same Dunlap who was associated with Mr. Hurd in the Santa Fé law department?

A. Yes, sir.

Q. You also employed Eugene Hagan?

A. Yes, sir.

Q. And then after the temporary injunction was allowed you employed A. L. Williams?

A. Yes, sir.

Q. State whether or not those attorneys appeared for you.

Counsel for the defendant objected to the question as calling for incompetent, irrelevant, and immaterial testimony and for that which is not the best evidence. The court overruled the objection; to which ruling of the court the defendant at the time excepted.

A. They did.

Q. For what purpose were those attorneys employed?

A. Hurd and Dunlap and Eugene Hagan and A. L. Williams to aid in preventing the granting of an injunction, to secure the dissolution of an injunction if granted.

Q. Do you remember how many hearings you had before Judge Foster?

A. My recollection is that there were two.

Q. First upon what proceedings?

A. Upon the granting of a temporary injunction.

Q. What ruling did Judge Foster make upon that?

Counsel for the defendant objected to the question as calling for that which is not the best evidence and as asking for incompetent, irrelevant, and immaterial testimony. The court sustained the objection; to which ruling the plaintiff at the time excepted.

Q. What was the other appearance your attorney made for you before Judge Foster?

A. To dissolve the injunction, is my recollection, and it may be to introduce the testimony of Woodbury and Moulton and dissolve the temporary injunction.

Q. Was there a hearing afterwards had before Judge Caldwell?

A. Yes, sir.

Q. At what place?

A. At Little Rock, Arkansas.
Q. How many of your attorneys were with you at that place?
A. Mr. Hurd, Mr. Williams, Mr. McFarland, and Mr. Hagan.
Q. Who paid the expenses of your attorneys on that trip?

Counsel for the defendant objected to the question as calling for incompetent, irrelevant, and immaterial testimony. The court overruled the objection; to which ruling the defendant at the time excepted.

A. I paid the expenses.
Q. After the temporary injunction was dissolved, Mr. Mulvane, did the attorneys employed by you for the purpose of preventing the issuance of the injunction and to obtain its dissolution present bills for their services in connection with the injunction?
A. They did.
Q. What was the amount of the bill of J. D. McFarland?

Mr. HISTED: The defendant objects to that question for the reason that it is asking for incompetent, irrelevant, and immaterial testimony and because it attempts to prove special damages, which
14 are not authorized by the pleadings in this case, and also because it further confounds elements of damages for attorneys' fees, which, even though pleaded, could not be included as damages with others. The defendant objects to any testimony concerning damages on account of the payment of attorneys for resisting the application for a temporary injunction, and contends that even if pleaded the only damages which the plaintiff could recover would be damages in obtaining a dissolution of the injunction. The defendant further objects because it appears that this bond was given in a proceeding in the Federal court, and under the law of the United States governing the liability of parties for damages on bonds or in such proceedings in Federal courts attorneys' fees are not included.

The court overruled the objection; to which ruling the defendant at the time excepted.

Mr. HISTED: And the defendant also objects because so much of the condition of the bond as purports to create a liability by reason of the *condition of the bond as purports to create a liability by reason of the* resistance of the temporary injunction and of the restraining order was entirely without any consideration therefor, and could not fix a liability by reason of such upon this defendant surety.

The court overruled the objection; to which ruling the defendant at the time excepted.

Q. (The question was repeated to the witness.)
A. Four thousand dollars.
Q. Did you pay it?
A. I did.
Q. What was the date of the payment?
A. May 24, 1890.
Q. Did Mr. McFarland give you a receipt?
A. He did.

Q. Have you it with you?
A. Yes, sir.
Q. Please produce it.

The receipt referred to was handed to counsel and was marked B C for identification.

Mr. LOOMIS: We offer this receipt in evidence.

Said receipt was read to the court and jury and is in words and figures as follows, to wit:

"J. D. McFarland, attorney and counselor at law, Bank of Topeka building, Topeka, Kansas.

United States Circuit Court, District of Kansas.

GEORGE P. WESCOTT and SAMUEL HANSON, Complainants,
vs.
JOAB MULVANE ET AL., Defendants.

Received May 24, 1890, of Joab Mulvane four thousand dollars for legal services rendered for defendants in above cause in the (*in the*) matter of procuring a dissolution of the temporary injunction granted therein.

J. D. McFARLAND."

Q. State, Mr. Mulvane, whether or not the amount of four thousand dollars paid to Mr. McFarland was for any other services than those rendered in your behalf in connection with the injunction proceedings in that particular case.

Counsel for the defendant objected to the question as leading and as calling for incompetent, irrelevant, and immaterial testimony. The court overruled the objection; to which ruling the defendant at the time excepted.

A. They were solely for my benefit, and no other, that I am aware of.

Q. State whether or not they were for any other services in the case than those connected with the injunction proceedings in the case.

Counsel for the defendant objected to the question as leading and as calling for incompetent, irrelevant, and immaterial testimony. The court sustained the objection; to which ruling the plaintiff at the time excepted.

A. They were not.

15 Counsel for the defendant moved the court to strike out the answer of the witness, and the court sustained the objection; to which ruling the plaintiff excepted at the time.

Q. I will ask you, Mr. Mulvane, to state what this payment of $4,000 was made to Mr. McFarland for.

A. For all legal services rendered to me by Mr. J. D. McFarland

in the matter of the injunction case in the suit between myself and Wescott and Hanson.

Q. State whether or not Mr. McFarland was employed by you to represent you upon the merits of the case.

A. He was not. By the merits you mean after the dissolution of the injunction?

Q. I mean any portion of the case which had reference to anything other than the injunction proceedings.

A. No, sir; he was not.

Q. State whether or not Mr. A. L. Williams made a charge against you for services performed in that case in connection with the injunction proceedings exclusively.

A. He did.

Q. What was the amount of his?

Mr. HISTED: We object to all this testimony with reference to attorneys' fees on the same grounds that were specifically set out above, and we want it understood that it all goes in subject to objection already made.

The court overruled the objection; to which ruling the defendant at the time excepted.

Q. (The question was read to the witness.)

A. Three thousand dollars.

Q. Did you pay it?

A. I did.

Q. When?

A. On the 30th day of April, 1890.

Q. Did Mr. Williams also represent you upon the merits of the case?

A. He did subsequently.

Q. State whether or not he made a separate charge for the services rendered upon the merits.

A. He did.

Q. State whether or not Hurd & Dunlap made a charge for services rendered in your behalf in connection with the injunction proceedings in that case exclusively.

A. They did.

Q. Were they employed to represent you on the merits of the case?

A. No, sir.

Q. Did they drop out of the case after the injunction was dissolved?

A. They did.

Q. Who was the only attorney that represented you after the injunction was dissolved upon the merits?

A. A. L. Williams.

Q. What was the amount of the bill of Hurd & Dunlap?

Counsel for the defendant objected to the question upon the same grounds recited in the objection above set out and because the same calls for incompetent, irrelevant, and immaterial testimony. The

court overruled the objection; to which ruling the defendant at the time excepted.

A. Six thousand dollars.
Q. Did you pay it?
A. I did.
Q. When?
A. April 14, 1890.
Q. State whether or not Eugene Hagan made a charge against you for services performed in your behalf in connection with the injunction proceedings in that case—that is to say, in resisting the allowance of the temporary injunction and in procuring its dissolution—exclusively.
A. He did.
Q. What was the amount of his bill?
A. Three thousand dollars.
Q. Did you pay it?
A. I did.
Q. When?
A. The 17th day of April, 1890.
Q. Now, you have already stated that you paid some expenses of your attorneys on the trip to Little Rock when the case was heard before Judge Caldwell. I wish you would state the amount which you actually paid out for expenses of yourself and attorneys
16 in making that trip to and from Little Rock.

Counsel for the defendant objected to the question as calling for incompetent, irrelevant, and immaterial testimony, and because the matter covered by the question is not pleaded in this case. The court overruled the objection; to which ruling the defendant at the time excepted.

A. $128.68 on April 6th.
Q. What is the date of that payment?
A. The payments were made on and before April 6th, 1890. I have entered them on my account as of April 6th.
Q. Is that the date of the last payment?
A. Yes, sir.
Q. On March 31st did you make any payments for expenses in connection with these injunction proceedings?
A. I did.
Q. What was the nature of these expenses?
A. I paid Mr. A. L. Williams $75.00 for expenses.
Q. For what?

Counsel for the defendant objected to the question as calling for incompetent, irrelevant, and immaterial testimony, and also upon the grounds recited in the objection hereinbefore set out. The court overruled the objection; to which ruling the defendant at the time excepted.

A. For expenses to Little Rock.
Q. In connection with these injunction proceedings?
A. Yes, sir.

Q. Was that over and above the amount of his fees that he charged?

A. Yes, sir; this was incidental expense outside of the amount I paid him as a fee.

Q. What was the date of the payment?

A. The 31st of March, 1890.

Q. Did you make any other separate payment of expenses to your attorneys?

A. Yes, sir.

Q. When?

Counsel for the defendant objected to the question on the same grounds as stated above as to special damages, and because the question calls for incompetent, irrelevant, and immaterial testimony. The court overruled the objection; to which ruling the defendant at the time excepted.

A. On March 11, 1890, I paid Eugene Hagan, expenses to Little Rock to see the court or judge with reference to hearing, $50.00.

Q. That is the hearing in connection with the injunction—in connection with the motion to dissolve the temporary injunction?

A. Yes, sir.

Q. Did you pay any costs in connection with the injunction proceedings in the Federal court to the clerk of the United States court in which the case was pending?

A. I did.

Counsel for the defendant objected to the question upon the same grounds recited above, and because the question calls for incompetent, irrelevant, and immaterial testimony. The court overruled the objection; to which ruling the defendant at the time excepted.

Q. State the payments made to the clerk for costs in connection with the injunction proceedings.

A. I paid Mr. George F. Sharitt in this injunction matter, on March 11, 1890, $20.00; on February 5, 1890, $34.55; also April 11, 1890, $37.25, for which I have receipts.

Q. Please produce those receipts.

Mr. Histed: The defendant especially objects to any testimony with reference to costs paid in the case in the Federal court as incompetent, irrelevant, and immaterial.

The court overruled the objection; to which ruling the defendant at the time excepted.

A. Here are the bills.

17 Q. Was not the date which you gave as February 5th February 15th, Mr. Mulvane?

A. No, sir. I have it the 5th here. I have the original check, which would show the exact date, and I think it is correct.

Mr. Loomis: I now offer these receipts of Mr. Sharitt in evidence.

Q. These are the bills made out by the clerk, are they?

A. Yes, sir.

The receipts referred to were marked respectively, for identification, C 1, C 2, and C 3 and are respectively in words and figures as follows, to wit:

"Circuit Court of the United States, District of Kansas.

Clerk's office. Geo. F. Sharitt, clerk.

TOPEKA, KANSAS, *March* 10, 1890.

GEORGE P. WESCOTT ET AL., Complainants,
vs.
JOAB MULVANE ET AL., Defendants. } Case No. 6448.

The deposit of $34.55 made by you in the above-entitled case is exhausted and a balance of $— now due on account of clerk's fees. I therefore urge upon you the *the* necessity of making an additional deposit of $20.00 to apply on accruing costs in said case. Under the law, I am compelled to account to the Government for all fees earned, whether paid or unpaid. I am authorized by the rules of the court to make this request, and hope you will comply at once; otherwise no further action will be taken by me in this case — behalf of defendants.

Very respectfully, etc., GEO. F. SHARITT, *Clerk*.

Joab Mulvane, Topeka, Kansas.

Circuit Court of the United States, District of Kansas.

Clerk's office. Geo. F. Sharitt, clerk.

TOPEKA, KANSAS, *Feb'y* 15, 1890.

GEO. P. WESCOTT ET AL.
vs.
JOAB MULVANE ET AL. } Case No. 6448.

No deposit by you made on behalf of defendants in the above-entitled case, and a balance of $35.55 now due on account of clerk's fees. I therefore urge upon you the necessity of paying this balance and of making an additional deposit of $10.00 to apply on accruing costs in said case. Under the law, I am compelled to account to the Government for all fees earned, whether paid or unpaid. I am authorized by the rules of the court to make this request, and hope you will comply at once; otherwise no further action will be taken by me in this case.

Very respectfully, etc., GEO. F. SHARITT, *Clerk*.

J. D. McFarland, A. A. Hurd, and E. Hagan, attorneys-at-law, Topeka, Kansas."

Circuit Court of the United States, District of Kansas.

Clerk's office. Geo. F. Shariff, clerk.

TOPEKA, KANSAS, *April 11th*, 1890.

GEO. P. WESCOTT ET AL.
vs.
JOAB MULVANE ET AL. } Case No. 6448.

The deposits of $34.55 and $20.00 made by you on behalf of def'ts in the above-entitled case are exhausted and a balance of $17.25 now due on account of clerk's fees made by def'ts. I therefore urge upon you the necessity of paying said balance and of making an additional deposit of $20.00 to apply on accruing costs in said case. Under the law, I am compelled to account to the Government for all fees earned, whether paid or unpaid. I am authorized by the rules of the court to make this request, and hope you will comply at once; otherwise no further action will be taken by me in this case.

Very respectfully, etc., GEO. F. SHARITT, *Clerk*.

A. L. Williams, A. A. Hurd, E. Hagan, J. D. McFarland, and Silas Jones, attorneys-at-law, Topeka, Kansas."

Q. Did you get receipts afterwards?

A. These bills are not receipted, but I have the original checks.

Q. Look at the bill about which I asked you as to date.

A. Well, I think you are correct. I made a mistake there. It would be the 15th of February.

18 Q. Did you get receipts from Hurd & Dunlap for fees paid them?

A. Yes, sir.

Q. Please produce them.

Witness produced the receipt referred to, and it was marked D 1 for identification.

Mr. LOOMIS: I offer in evidence this receipt from Hurd and Dunlap.

Said receipt was read to the court and jury and is in words and figures as follows, to wit:

"Topeka, Kansas, April 14th, 1890. Joab Mulvane, the Topeka Water Supply Company, & the Topeka Water Company to Hurd & Dunlap, Dr., for professional services in procuring dissolution of temporary injunction in case of Wescott and Hanson *vs.* Joab Mulvane *et al.* in United States circuit court for district of Kansas, $6,000.00. Received payment, Hurd & Dunlap."

Q. Did you take any receipts from Mr. Hagan and Mr. Williams?

A. I think in neither case. I have Mr. Hagan's bill, but — was put into his account.

Q. Was the bill signed when the payment was made?

A. I don't think it was. I think the amount was placed to his credit, but I think I have the check for the amount.

Q. Have you got the check you paid him with?
A. I think I can find it. I have not got it with me.
Q. How about the payment made to Mr. Williams? You took no receipts?
A. Yes, sir; I have the check, but I have not it with me, but I have seen it since in looking over the papers.
Q. Did you pay any stenographer's fees in connection with the proceedings relating to the restraining order or temporary injunction in that case?
A. I did.
Q. To whom was the payment made, and when and for how much?

Counsel for the defendant objected to the question upon the same grounds as stated above and because the question calls for incompetent, irrelevant, and immaterial testimony. The court overruled the objection; to which ruling the defendant at the time excepted.

A. I paid C. V. Safford for preparation of injunction papers or in connection with that, February 24, 1890, $6.00.
Q. This, you say, was for preparing papers relating to the injunction proceedings?
A. I so understood it.
Q. Who employed Mr. Safford?
A. My attorney.
Q. State whether or not they approved the bill of Mr. Safford.

Counsel for the defendant objected to the question as calling for incompetent, irrelevant, and immaterial testimony. The court overruled the objection; to which ruling the defendant at the time excepted.

Q. Is this the bill that Mr. Safford presented?
A. That is the bill, and it was approved at the time by the attorney?
Q. Just orally?
A. Yes, sir.

The paper referred to is marked D 3 for identification and is in words and figures as follows, to wit:

"Topeka, Kansas, 3, 8, '90. Joab Mulvane, Dr., to C. V. Safford, to services as stenographer, Feb'y 24, $6.00. Received payment, C. V. Safford."

Q. State whether or not you paid any telegraph bills made necessary by this injunction proceeding.
A. I did.
Q. When and how much?

Mr. Histed: We make the same objection to this testimony upon the same grounds as the other.

The court overruled the objection; to which ruling the defendant at the time excepted.

A. April 26, 1890, I think was the date of the last payment, seventy dollars and sixty cents.

Q. State whether or not you paid any expenses of D. W. Mulvane to New York.

A. I did.

Q. How many trips were there?

A. Two trips.

19 Q. What was the nature of those expenses?

A. Traveling expenses, board while there, and reasonable compensation for time.

Q. What was the object in sending D. W. Mulvane to New York upon those trips?

A. I had sold the stock under contract to Coffin & Stanton and Woodbury & Moulton, and was under obligation to turn it over on the tenth of February, 1890; had been paid fifty thousand dollars on the contract, and the injunction or restraining order on the fifth of February prevented me from doing so.

Counsel for the defendant objected to the question and to the answer of the witness as incompetent, irrelevant, and immaterial and because the answer states that which is not the best evidence. The court sustains the objection; to which ruling the plaintiff excepted at the time.

The COURT: The question is, how did you come to send him to the East?

A. Being restrained by the order of the United States court from carrying out my contract——

The COURT: Don't state what the contents of the order was or the injunction, but state the purpose for which you sent him East.

A. Having sold the property, as I said, to Coffin & Stanton, parties in New York city, and being unable to comply with my contract by reason of a restraining order, I found it necessary to acquaint them with all the facts in the case and the reason why I could not comply with my contract with them and to induce them or convince them that I would ultimately comply with the contract, and that I felt that I would be released from the embargo or restraining order, and that I had complied in every other respect with my contract and was able to make good my intentions in that regard, to satisfy them in reference to the whole matter. I was to have delivered the bonds executed by the new company in the organization which they required me to establish, and these bonds——

Counsel for the defendant objected to the answer of the witness as incompetent, irrelevant, and immaterial. The court sustained the objection; to which ruling the plaintiff at the time excepted.

Q. State whether or not Mr. Mulvane was sent there for the purpose outlined in your answer.

A. He was.

Q. What amounts did you pay to Mr. Mulvane on those trips for the purpose as stated?

Counsel for the defendant objected to the question as calling for incompetent, irrelevant, and immaterial testimony and for the reason that the damages are not specially pleaded and because they are not shown to be necessary expenses. The court overruled the objection; to which ruling the defendant at the time excepted.

A. On February 7, 1890, I paid D. W. Mulvane two hundred and forty dollars for expenses incurred by him in a trip to New York to satisfy the purchasers.

Q. Coffin & Stanton?

A. Yes, sir; and Woodbury & Moulton; that I intended to comply with my contract, and was making every effort to do so to satisfy them with reference to the condition.

Q. When was the trade to be carried out with Coffin & Stanton?

A. The tenth day of February, 1890.

Q. And the restraining order was issued when?

A. On the fifth.

Q. And the hearing for a temporary injunction was set down?

A. For the 12th, as I remember it.

Q. Was it necessary for D. W. Mulvane to make another trip to New York for the same or similar purposes?

A. Yes, sir.

Q. When was that made, and what were the expenses of the trip?

A. The subsequent trip; I paid two hundred and eight dollars March 1, 1890, for the second trip.

20 Q. These dates that you have given in connection with the expenses of those trips, are they the first or last payments made?

Counsel for the defendant objected to the question upon the same grounds as recited in the above objection and because the question calls for incompetent, irrelevant, and immaterial testimony. The court overruled the objection; to which ruling the defendant at the time excepted.

A. Final payments.

Q. What is the amount that you were prevented from collecting from Coffin & Stanton by reason of the restraining order and temporary injunction?

Counsel for the defendant objected to the question as calling for incompetent, irrelevant, and immaterial testimony and because there is no showing that he was prevented from collecting any amount from Coffin & Stanton by the restraining order and for the reason that the question attempts to determine the object and scope of the order of the court. The court sustained the objection; to which ruling of the court the plaintiff at the time excepted.

Q. How much had you received on the contract with Coffin & Stanton?

A. I had received $50,000.00.

Q. And when were you to receive the balance?

A. On the tenth day of February, 1890.

Counsel for the defendant objected to the question as calling
incompetent, irrelevant, and immaterial testimony and objection
any testimony of this witness with reference to the terms of t
written contract, when the written contract is in his possession. T
court overruled the objection; to which ruling of the court the d
fendant excepted at the time.

Counsel for the defendant moved the court to strike out the answ
of the witness because it conflicts with the testimony already intr
duced by the witness.

Mr. LOOMIS: It may be stricken out; we will consent.

Q. After the temporary injunction was dissolved did you carry ou
the contract with Coffin & Stanton?

A. I did.

Q. How much did you receive from them upon the contract a
that time when it was finally carried out?

A. You mean in total in connection with the fifty thousand dol-
lars received when the contract was made?

Q. I don't care about the fifth thousand dollars.

A. Well, the total amount received from Coffin & Stanton and
which was due me on the tenth was $503,333.33.

Q. What was the date you received that amount?

A. Well, various dates after the dissolution of the injunction.

Q. None, however, received until after the injunction was dis-
solved?

A. None except the fifty thousand dollars paid when the contract
was made.

Cross-examination.

Questions by Mr. SMITH:

Q. What connection, if any, had you with the company known as
the Topeka Water Supply Company?

A. I was president and a stockholder.

Q. State what that company was, where it existed, and the amount
of its stock.

Counsel for the plaintiff objected to the question as improper cross-
examination and as calling for incompetent, irrelevant, and immate-
rial testimony. The court overruled the objection; to which ruling
the plaintiff at the time excepted.

A. You mean at what period?

Q. Was it a company here in town?

A. Yes, sir; in the city of Topeka. You mean the original capital
stock or at the time of this controversy?

21 Q. At the time of this controversy.

A. The capital stock was four thousand shares of stock of
one hundred dollars par value each.

Q. You were president of the company?

A. Yes, sir.

Q. Did you enter into a contract with the plaintiffs in this case,

Wescott & Hanson, with reference to the purchase of the capital stock of this company?

A. I entered into a preliminary agreement with them for the sale of this stock, such preliminary agreement to be concluded with a contract which was to be drawn up a few days later.

Q. The contract you refer to, was that the first contract you had with them?

A. That was the only one I had with them.

Q. Before signing the contract you refer to, where you visited by either one of these plaintiffs, and did they leave with you a contract to be executed on their part which you could comply with at any time with reference to the acquirement of the entire stock, capital stock, by you, and turning it over to them?

Counsel for the plaintiff objected to the question as improper cross-examination, and because the question calls for incompetent, irrelevant, and immaterial testimony. The court overruled the objection; to which ruling the plaintiff at the time excepted.

A. I was visited by both of these parties, separately, however, and one of them did submit a proposition for the purchase, but not a contract, and I never signed it.

Q. Was it in pursuance of this proposition submitted to you by them that you subsequently visited Boston and signed the proposition or contract that you refer to?

A. It was; it succeeded and was a part of the negotiations. My going to Boston was by reason of their having been here and having submitted a proposition of purchase.

Q. At the time you went to Boston, did you own the entire capital stock of the Topeka Water Supply Company?

A. I did not, but I had options on the purchase of it.

Q. How much of the capital stock of the water company did you own?

A. Well, I can't answer that question definitely. I owned about fifty-six thousand dollars, perhaps fifty-seven thousand dollars or nearly sixty thousand dollars, myself and children, and then I acquired or had options for the purchase of nearly all of the stock when I went to Boston.

Q. Then you did not close those options?

A. No, sir.

Q. I would like to read you a contract set forth in the record and see if that is the contract you mention that you executed in Boston:

"BOSTON, *December* 14, 1889.

GENTLEMEN: I will sell you the entire capital stock of the Topeka Water Supply Company of Topeka, Kansas, which consists of four thousand shares of par value of one hundred dollars per share, for the sum of five hundred thousand dollars, on the following terms of payment, namely, the sum of sixty thousand dollars to be paid in cash on the signing of a contract to be made and entered into as of this date, the consideration in said contract to be four hundred and forty thousand dollars, to be paid as follows: the sum of two hun-

dred thousand dollars to be paid February 10, 1890; one hundre
and forty thousand dollars to be paid February 20, 1890, and on
hundred thousand dollars to be paid March 20, 1890; provided tha
final payment of the last-named sum of one hundred thousand dollar
may be paid on February 20, 1890, if said Wescott & Hanson ma
elect so to do, by giving me five days' notice of such intention; pay
ment to be made for and delivery of said stock to be made a
22 the National Bank of North America, in the city of Boston
Massachusetts.

JOAB MULVANE."

Directed to George P. Wescott and Samuel Hanson.

"We hereby accept your offer to sell the entire capital stock of th
Topeka Water Supply Company for the price and on the terms an
conditions above stated.

GEORGE P. WESCOTT.
SAMUEL HANSON."

Q. Is that the paper?

A. Let me see that, please. I think this is the preliminary propo
sition first made in conversation with these gentlemen who wer
present with me in a room in the hotel in Boston, and as this con
versation transpired one of these gentlemen jotted it down substan
tially and turned to me and said, "Is this your proposition?"

Q. Well, I don't care anything about that.

A. I propose to tell all about it.

Q. (The question was read to the witness.)

A. You use the word contract, but I don't think any such wor
was connected with it at all. That that is substantially the proposi
tion, I believe to be correct, that I made and signed.

Q. What day of the week was that?

A. The 14th day of December.

Q. What day of the week?

A. It was Saturday, I think.

Q. Did you subsequently enter into another contract with Coffi
& Stanton?

A. I did.

Q. How long after that, the date of this paper?

Counsel for the plaintiff objected to the question as improper cross
examination, as calling for that which is not the best evidence, an
as asking for incompetent, irrelevant, and immaterial testimony
the court overruled the objection; to which ruling the plaintiff a
the time excepted.

A. You mean the subsequent sale made to Coffin & Stanton?

Q. Yes.

A. The sale was made on the 18th day of December, 1889.

Q. Have you a copy of the contract there?

A. I have it.

Q. Will you let me see it?

A. (The paper is handed to counsel.)

Q. This is the contract subsequently entered into between you and Coffin & Stanton, is it?

A. That is the contract of sale to Coffin & Stanton and Woodbury & Moulton.

Mr. SMITH: I offer this in evidence in connection with the cross-examination of this witness.

The paper referred to was read to the court and jury and is in words and figures as follows, to wit:

"This agreement entered into this the eighteenth day of December eighteen hundred and eighty-nine, between Joab Mulvane of Topeka, Kansas, party of the first part, and Coffin & Stanton of New York city and Woodbury & Moulton of Portland, Maine, party of the second part witnesseth: That in consideration of fifty thousand ($50,000.00) dollars paid by the party of the second part to the party of the first part, as part purchase-money, the receipt of said fifty thousand ($50,000.00) — being hereby acknowledged, and for the further consideration of five hundred thousand ($500,000) dollars to be paid to the party of the first part, on or before February tenth, eighteen hundred and ninety, with interest at the rate of six per cent. (6 %) per annum from January first, eighteen hundred and ninety, by said party of the second part, the party of the first part does hereby sell to the party of the second part the entire capital stock of the Topeka, Water Supply Company of Topeka, Kansas, and it is also agreed that the party of the first part will carry out a plan regarding the legal issuance of stock and bonds by said Topeka Water Supply Company and the organization of and issuance of stock and bonds by a new company if desired, said plan to be formulated by the party of the second part.

Said stock and bonds so issued to be delivered to the party
23 of the second part by the party of the first part, upon receipt of said purchase price, viz., five hundred and fifty thousand dollars, all expense of such issuance of stock and bonds to be borne by the party of the second part. It being distinctly understood and agreed, however, that in no event shall the party of the first part be required to part with any of the property hereby purchased until the full amount of purchase-money has been paid. Upon the fulfillment and carrying out of the terms and obligations of this contract, it is agreed that all revenue earned by the Topeka Water Supply Company, on and after January first, eighteen hundred and ninety, shall become the property of the party of the second part, and that all legitimate charges incurred by said Topeka Water Supply Company on and after January first, eighteen hundred and ninety, shall be paid out of said revenue.

It is also agreed that in the event of the default in payment of said five hundred thousand ($500,000.00) dollars due on February tenth, eighteen hundred and ninety, and such non-payment is not the fault of said party of the second part, then in that event the party of the first part hereby agrees to give the party of the second

part a reasonable extension of time to make such payment of five hundred thousand ($500,000.00) dollars.

JOAB MULVANE.
COFFIN & STANTON.
WOODBURY & MOULTON.

Executed in triplicate.
New York city, December 18th, 1889."

Q. After executing the contract which I have just read did you come back to Topeka and organize the new company known as the Topeka Water Company?

A. Yes, sir.

Q. Who was president of that company?

A. I was.

Q. When was that company organized?

A. My recollection is, in January, 1890.

Q. That was the company organized in pursuance of the terms of this contract which I have just read?

A. Yes, sir.

Q. For the purpose of transferring the property?

A. Yes, sir.

Q. To convey the property of which you negotiated the sale?

A. Yes, sir.

Q. And you were elected president of that company?

A. Yes, sir.

Q. What steps were taken by you as president to carry out the terms of this contract?

A. I secured the re-enactment of the old contract to the Topeka Water Supply Company to the Topeka Water Company and all necessary arrangements with the city to end all the rights of the old company by giving to the new, filing charter and everything with the State.

Q. Did the old company, the Topeka Water Supply Company, execute a deed of conveyance to the Topeka Water Company?

A. That is my recollection.

Q. Did the new company also execute bonds?

A. Yes, sir.

Q. What was the amount of that issue; do you remember?

A. Why, the amount provided for was $1,500,000 is my recollection.

Q. The new company went into possession of the property of the old company?

A. At what time?

Q. Along about the first of January.

A. No; I think it was not perfected. I think the arrangement with the city was not perfected until towards the last of January.

Q. The new company was in possession prior to the bringing of this injunction suit?

A. Well, I was in possession.

Q. Well, you were president of the new company, were you not?

A. I had acquired, through option of purchase, all of the stock

and really was running the business, and I think under the old organizantion, I am not sure whether up to the first of February or just when, the accounts were changed. I don't recollect as to that.

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Q. Don't you know that you, as president of the new company, had signed a large number of bonds upon this plant, and that the deed had been recorded, and this new mortgage was recorded some time prior to bringing this injunction suit?

A. I can't say as to dates.

Q. Well, you were in possession of that work personally as Joab Mulvane *of the water works*?

A. No, sir; we run it under the old corporation, but I practically owned it.

Q. You were president of the new corporation that was in possession of it?

A. Yes, sir; but the new corporation was mine until I got my pay for the stock.

Q. Well, that is a question.

A. Well, the contract so stipulates. It was all mine until I got my money.

Q. You treated the new corporation as yours and the old corporation as yours individually?

A. I did not say individually.

Q. You say it was all yours; how was it yours, then? You don't mean it was yours, do you? Don't you mean it belonged to the Topeka Water Company, a corporation; was not that the legal owner of it?

A. I will not say that. I acquired the entire moneyed interest of both corporations and necessarily had to do so before I could convey that to — purchasers, Collin & Stanton and Woodbury & Moulton.

Q. You don't mean to say there was any deed to you individually?

A. No, sir; it was all deeded to the corporation.

Q. The corporation owned the property?

A. You can consider that as you like. As a matter of fact, I owned the corporation and everything relating to it, but was running business as corporations.

Q. Then along in February this suit was brought against you?

A. This restraining order was served the fifth of February, as I remember it.

Q. They served you with process there?

A. I was served with the usual papers of court.

Q. As Joab Mulvane, and then you were served as Joab Mulvane as president of the Topeka Water Supply Company and as president of the Topeka Water Company, both, were you not?

Counsel for the plaintiff objected to the question as calling for that which is not the best evidence and for incompetent, irrelevant, and immaterial testimony. The court overruled the objection; to which ruling the plaintiff at the time excepted.

A. I don't remember as to the details, but I presume I was served in every sort of way. I don't recollect whether there was any service

on me individually outside of being president of each of the companies, but I presume I was; I don't remember.

Q. What was the first thing you did after being served with process in this case?

A. About the first thing I did was to look up some lawyers. I needed a lawyer, and I went after him.

Q. Who did you first employ?

A. I think McFarland.

Q. What did you say to him when you called him?

A. O, I can't tell you. I don't remember what was said.

Q. What did you employ him for? You told him you had been sued, didn't you?

A. I showed the papers to him and told him I wanted him to serve me in this case. He was a lawyer, and I assumed that he would know what it meant.

Q. Had he been the lawyer of the Topeka Water Supply Company a long while before that?

A. Not in a regular way.

Q. Well, in an irregular way?

A. I am not sure.

Q. Didn't he represent the Topeka Water Supply Company in all of its important litigations for several years?

25 A. No, sir; I think not; so far as having a regular lawyer was concerned, I think Mr. Milton Case was so regarded, but we had none on a salary.

Q. Whenever you had any litigation that amounted to anything you employed Jim McFarland, didn't you?

A. No, sir; we employed the honorable judge here once in connection with Mr. Case.

Q. Mr. McFarland was counsel of the company in its litigation with Potwin?

A. I think he was in that case; I don't remember any other case he was in.

Q. You naturally went to him because he had represented the company before?

A. No, sir; I did not go for that reason at all.

Q. Why did you?

A. Because I knew he was a good lawyer. But he was not the lawyer of the corporation; we had no lawyer unless it was Mr. Milton Case; the superintendent of the company asked him questions; he was a member of the board, and I think in current matters Mr. Case was regarded as counsel of the company.

Q. You went to McFarland and turned over the papers?

A. That is my recollection.

Q. And told him to take charge of it?

A. Well, I employed him, but not to the exclusion of anybody else.

Q. You employed him as president of the Topeka Water Company?

A. No, sir.

Q. As president of the Topeka Water Supply Company?

A. No, sir; I don't think there was any reference made to the company at all.

Q. You turned over all the papers that were served upon you and told him to go ahead and take charge of the suit?

A. I can't tell you what was said, but I employed him to represent me in the matter; as to the details of the conversation, I can't tell you at this time.

Q. Did you have any talk with him at *a* that time about his compensation?

A. No, sir.

Q. Just went and employed him as you would any *other* lawyer?

A. I regarded him as an able man.

Q. At that time you did not know how extensive the litigation would be?

A. No, sir.

Q. Nor what he would be required to do?

A. No, sir.

Q. Who next did you employ?

A. I am not sure whether Hurd & Dunlap first, but I employed Hurd and Dunlap and Hagan and McFarland early, very early, in the matter.

Q. All the same way?

A. Yes, sir; went to them personally.

Q. Did not have any contract with them?

A. No, sir.

Q. Just told them to go ahead and represent the defendants in the case?

A. I just employed them to go ahead and meet whatever the case presented.

Q. They subsequently appeared for you, didn't they?

A. Yes, sir.

Q. And for the Topeka Water Company and for the Topeka Water Supply Company?

A. Yes, sir; I think they are of record in that way.

Q. Then there was another defendant in the case, Coffin & Stanton?

A. Yes, sir; Coffin and Stanton and Woodbury and Moulton.

Q. Did you employ anybody to represent them?

A. Well, not directly, and yet I can't say that I did directly.

Q. There was no contract made with any of these counsel at the time you employed them?

A. Not by me.

Q. As to what they should do or the amount they should be paid?

A. No, sir; I assumed they knew what to do; that is what I employed them for.

Q. Just employed them generally to represent you in the case?

A. Yes, sir.

Q. And the companies you represented?

26 A. No, sir; there was nothing said about the companies that I know of.

Q. Didn't you consider these companies the same as yourself?

A. Yes, sir; the companies were myself, and I was the companies

as far as accomplishing the result of being relieved from the restraining order. I was the party that was aimed at, and the companies were simply attacked indirectly to get at me.

Q. And you authorized counsel to appear for those companies, didn't you?

A. In whatever way was necessary.

Q. If they did appear, of course it was in pursuance of your retaining them to represent the company, wasn't it?

A. I think they are of record as representing both me and the companies, *but they never were paid by the company.*

Q. Now, you had Hagan and Hurd & Dunlap and McFarland, and you still thought you needed additional counsel?

A. I made up my mind I did.

Q. Why?

A. I felt that my fortune was at stake—my reputation was at stake. I was attacked for violation of a contract. I was accused of wanting to escape from the obligations of a contract, and was charged that because I got more money I was wanting to violate a contract. I felt it was necessary, absolutely, to succeed from every standpoint; that my fortune, my reputation, was at stake in the matter, and I did not propose to fail for lack of counsel.

Q. What fortune was there at stake in the matter?

A. Well——

Q. There was nothing more than fifty thousand dollars involved, was there?

A. Yes, sir.

Q. Was not the difference between those two parties just fifty thousand dollars, and didn't you agree to sell to Wescott & Hanson for five hundred thousand dollars, and finally two days afterwards went over to New York and made a contract to sell to Coffin & Stanton and Woodbury & Moulton for fifty thousand dollars in advance? It was to enforce this first contract that suit was brought. How does that involve your whole fortune?

A. The suit was brought to enforce what was claimed to be the first contract. Now, it involved my fortune in this way: I was obliged to buy the entire stock of the water company to enable me to comply with my contract. I was obliged to own the whole thing. I had fifty thousand dollars of Coffin & Stanton's money which they could have demanded if I had failed to comply with my contract. I was obliged to go into the bank and borrow money—twenty-seven thousand dollars—and give my notes and carry the whole thing.

Q. You say you had to buy all this property. You had bought that before, hadn't you?

A. I had bought a large amount of it before I went.

Q. You owned it at the time you entered into this contract with Coffin & Stanton, didn't you?

A. I owned it in my own right. I had bought some of it and paid for it. I had given my notes for a large amount, and I had options for all of it. So it became necessary for me to close at once and either pay the money at once or give my obligations to pay for the stock or assume liability for the stock.

Q. How much did you pay for the stock on an average?

A. I paid par for every dollar of it.

Q. How much did you get from Coffin & Stanton in addition to par?

A. I paid $400,000 and considerable interest. I got from Coffin & Stanton——

Q. 550,000, wasn't it?

A. Yes, sir; more than that. I got $550,000 and the interest that was due me from the first of January up to the tenth of February, *which I was entitled to by reason of their getting* the earnings of the plant; $503,333.33 in addition to the fifty thousand dollars they had paid originally.

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Q. If Wescott & Hanson had made you carry out what they considered their contract, you would have only made $100,000 instead of $150,000? There was only $50,000 difference between these two contracts. Your fortune was a great deal more than $50,000 at that time, wasn't it?

A. My fortune was more than $50,000.

Q. Yes.

A. I was worth more than that at that time.

Q. Yes.

A. Yes, sir; I was.

Q. Now, going back to where you started from, didn't you consider Mr. McFarland capable of managing this matter when you retained him?

A. I considered him a capable lawyer, but I did not consider him or any other one lawyer equal to the emergency. Time was a very important element to me.

Q. There was no great emergency?

A. Yes, sir.

Q. All you had to do, as it turned out, was to go into court and suggest that there was an undisclosed principal by the name of Woodbury & Moulton who participated in this contract that you made with Coffin & Stanton, and as soon as the court's attention was called to that fact, by reason of Woodbury & Moulton being citizens of the same State with one of the plaintiffs—that is, of the same State with Mr. Wescott—of course, the Federal court understood it did not have jurisdiction and dissolved the injunction? That was all there was to it, wasn't there?

Counsel for the plaintiff objected to the question as asking for the legal conclusion of the witness, as improper cross-examination, and as calling for that which is not the best evidence and for incompetent, irrelevant, and immaterial testimony. The court overruled the objection; to which ruling the plaintiff at the time excepted.

A. No, sir; there was a great deal more to it. I could not hold Coffin & Stanton and Woodbury & Moulton as purchasers one single day after the 10th of February, except at their pleasure.

Q. I will call your attention to the terms of this contract just read in regard to further time.

A. That only applied to them. I had no further time; that did not apply to me at all; in that respect I was limited.

Q. After you employed McFarland, then, you went and employed Hagan, was it?

A. I don't know in which order—Hurd and Dunlap and Hagan and A. L. Williams.

Q. Why did you employ Hurd & Dunlap?

A. Because they were eminent lawyers, and I felt I needed counsel, and the case was a delicate one, and one in which I needed to reach a dissolution of the injunction at the earliest possible moment. I could not afford any mistake.

Q. You wanted to beat that suit, didn't you, as well as dissolve the injunction?

A. Well, they went together.

Q. You considered Hurd & Dunlap a good firm?

A. Yes, sir.

Q. A strong firm?

A. Yes, sir.

Q. And employed them because they were able lawyers?

A. Yes, sir.

Q. Why were you not satisfied with Hurd & Dunlap and McFarland? Why did you need anybody else?

A. I found that lawyers are lawyers, ready to advise additional counsel, and they never feel sure of anything.

Q. Are they where it requires a division of the fees?

A. I don't know about that.

Q. Well, who next did you employ?

A. I can't tell the order. The last man I employed was Mr. Williams.

28 Q. Why did you employ Mr. Hagan?

A. Because I felt he would be valuable in the case.

Q. After you got all these eminent counsel, Mr. Hagan, Hurd & Dunlap, and McFarland, then you were not satisfied even then, but went to Mr. Williams, did you?

A. Yes, sir.

Q. What time did you employ Mr. Williams, with reference to the proceedings instituted?

A. I think I can't tell you the date, but Mr. Williams was employed, I think, on or about the time of the hearing before Judge Foster.

Q. You employed him the same as you did the rest of these lawyers?

A. I employed him to represent me in the case.

Q. To represent you and the water companies?

A. Whatever was necessary to my interests in the case.

Q. No contract made with reference to fees?

A. No, sir.

Q. You paid these bills as they were presented?

A. Well, I think that even higher bills were asked, and I protested.

Q. You did not protest against Mr. Williams' bill, did you?
A. No, sir.
Q. Or McFarland's bill?
A. I think not.
Q. Or Hurd & Dunlap's bill?
A. I think there was only one instance in which I protested.
Q. When did you take these receipts you have offered in evidence—the receipt from McFarland; when was that taken?
A. At the time of the payments.
Q. Was that receipt in existence at the time of the former trial of this case?
A. Yes, sir.
Q. Was that receipt given to you at the time the payment was made?
A. Yes, sir.
Q. Did you ask him for a receipt?
A. I don't remember as to that.
Q. Did you ask him what the receipt should show?
A. I don't remember that I did.
Q. None of these payments were made by you until some time after Judge Caldwell had dissolved the injunction?
A. Well, very soon after; almost immediately afterwards. The injunction was dissolved the fourth or fifth of April, and the last payment was made, I think, in May and the others in April.
Q. But they were all made after the injunction was dissolved?
A. Yes, sir.
Q. After you thought you had fixed a liability on Wescott & Hanson on their injunction bond?
A. I don't know as I had any thought about it. I intended to fix them for all I could rightfully.
Q. And was very liberal in the payment of these bills on that account?
A. No, sir.
Q. Why not?
A. Because I had no assurance in paying out the money then or of getting it at the end of a lawsuit.
Q. You felt perfectly confident, didn't you?
A. I don't know as I did.
Q. Didn't these counsel all say that you would have no trouble in getting this money back again?
A. I can't say that matter was discussed.
Q. Wasn't you advised that there was a liability against Wescott & Hanson on the injunction bond?
A. No, sir. If you wish to impress the jury on the line that there was fixed up a job, there was no such talk.
Q. Well, you fixed up a pretty good job, didn't you?
A. The business was honorable, so far as I know. I don't know what attorneys fairly ought to charge for their services. I am not an expert in that line.
Q. You say you paid $70,00 for telegrams?
A. Yes, sir; I think more than that.

Q. Who did you telegraph to?

29 A. The telegrams will show for themselves. I have them all, I think.

Q. I wish you would produce them.

A. Telegraphing to New York and back and forth and to Portland, Maine.

Q. You paid seventy dollars for telegraphing and had to send your son down there twice on this same business?

A. Yes, sir.

Q. What is the use of telegraphing if he was there?

A. The telegrams are very brief.

Q. I would like to see those telegrams, all of them.

A. Well, I think I can find them.

NOON.

Court adjourned to one thirty p. m. Thursday, June 16th, 1898.

1.30 P. M.

Court met pursuant to adjournment, and the trial proceeded as follows:

JOAB MULVANE, the plaintiff, recalled to the witness stand, testified as follows:

Cross-examination resumed.

Questions by Mr. SMITH:

Q. You said that you had telegrams which covered this $70 of disbursements for messages to New York and other places in reference to this injunction. Have you got those telegrams with you?

A. I have not got the telegrams. I have the memoranda and date upon which the account is made up.

Q. Why didn't you produce the actual telegrams?

A. Many of them were sent from different points, and I did not keep copies of them.

Q. Why didn't you produce those that you have got?

A. Well, it would be very difficult to find those. I presume I have not got all of them.

Q. Didn't you state that you had them?

A. I might have so stated, and as a general proposition I presume I could gather up most of them; but what I meant by my answer was that I had a careful account and data to show how that account was made up.

Q. What I wanted was the telegrams themselves to show whether they had connection with this matter or not.

A. Well, I can't do that.

Q. I have no doubt that you paid out $70, but I want to know what you paid it out for. You said you paid D. W. Mulvane, your son, some money to go to New York?

A. Yes, sir.

Q. How much was that?

A. It was in two separate items for two different trips.

Q. When was the first trip made?

A. March 1, 1890.

Q. How much was that?

A. $208.00.

Q. What did that cover?

A. Well, I have a bill here which was made out and which will speak for itself. Here is the bill.

Q. He charges *per diem* there for services, did he?

A. It is just as the bill states.

Q. Did you employ him as counsel to go there as attorney?

A. I employed him to go there to do things I asked him to do.

Q. That did not have any bearing upon the motion to dissolve the injunction, did it?

A. It was an expense entailed upon me by reason of the injunction.

Q. Wasn't it by reason of the suit being brought, not the injunction itself?

A. By reason of the injunction which prevented me from meeting these parties and complying with my contract.

Q. What necessity was there for sending a man there personally when you could just as well telegraph the facts to the parties you were dealing with that suit had been brought and you had been enjoined and as soon as you got rid of this injunction you would fulfill your contract? What was the necessity of sending your son there with reference to dissolving the injunction; if you sent your son there to negotiate generally to settle this lawsuit that is not a competent expense?

A. I don't understand you.

30 Q. If you sent your son there to explain why this suit was brought or to work up a general defense, that is not a proper expense.

A. If there had been no injunction, I would not need to send him. I would have been there myself with the stock and bonds to turn over and get my money, but the injunction made it necessary in order to hold these parties.

Q. You think it was necessary?

A. I deemed it absolutely necessary. These parties told me they had sold a large amount of the bonds and they expected delivery of them on the tenth day of February.

Q. Those were the bonds of the new company?

A. Yes, sir.

Q. Well, was it to explain why those bonds were not delivered that you sent your son there?

A. By reason of this injunction; yes, sir.

Q. That was the great drawback that occurred at that time, was that, and the fact that the Topeka Water Company could not deliver its bonds?

A. I could not deliver the stock. I had all of the stock endorsed to me in blank and the entire property. I also had these bonds, which had been forwarded to me to execute, and it was necessary

to turn over to them the stock and the bonds, and I was enjoine from doing it.

Q. You were enjoined from executing these bonds of the Topek Water Company?

A. I had them practically executed.

Q. You were enjoined from delivering them?

A. Yes, sir.

Q. And to show why those were not delivered you sent your so on?

A. That was in part a reason, as I have stated.

Q. Why was it necessary to send him twice?

A. The hearing for a temporary injunction was not favorable, an these parties were very anxious and very solicitous, both writing an wiring me, stating the necessity of having the bonds in order to plac them and to have the stock to have the transaction closed. Th same necessity existed for the second trip that existed for the first.

Q. There was no other explanation except the one that he mad the first time?

A. Well, I tried to explain the whole matter. The injunction re strained me from complying with my contract of sale to these parties They had a right to the property.

Q. It restrained you and the two water companies and Coffin & Stanton, too?

A. That is my understanding; yes, sir.

Q. Then you thought it necessary again to send your son to ex plain why the new company did not issue the new bonds and sen them on so Coffin & Stanton could comply with their propositio and dispose of the new bonds?

A. It is just as I have stated.

Q. Haven't you said that?

A. I think I have said more than that. They were entitled to th stock, as well as the bonds, as part of my contract. They had se them to be executed, and I had executed them.

Q. With reference to employing all these attorneys, it was with view to settling this whole controversy, wasn't it, so you could de liver the new bonds of the company, so that Coffin & Stanton coul comply with their contract and settle the whole thing? You wante to get rid of this lawsuit was the reason why you employed these a torneys, wasn't it?

A. It was to enable me to comply with my contract. That wa the object of my employing attorneys.

Q. With that purpose in view these counsel went in and repre sented all the defendants in that suit?

A. I never employed them to represent any one but myself. An other representation was incidental.

Q. Well, you were president of the two companies?

A. Yes, sir.

Q. And you said before when these papers were served o
31 you, you took them over to Mr. McFarland and gave them t him and told him to go in and defend the case, or in sub stance that?

A. I acquainted him with the suit.

Q. And you ratified everything done by these various counsel—things done for you individually and things done for Coffin & Stanton and things done for the Topeka Water Company and for the Topeka Water Supply Company, both of which companies you were president of?

A. I left it to the wisdom of my counsel to determine what to do.

Q. When you paid these bills you got a full release from them for all the services rendered by them in the case?

A. I never got any receipt -or any services rendered for anybody but myself.

Q. That was the understanding between you and them; they were not to charge the water companies anything?

A. No understanding about it. I employed them to take care of my case.

Q. Your case was the whole case, wasn't it?

A. Well, I held all the stock of both companies; it was transferred to me in blank. I held it all; controlled the whole situation.

Q. You remained president of the Topeka Water Company quite a while after that, didn't you?

A. Yes, sir.

Q. No claim was made against that company by any of these attorneys, was there?

A. No, sir; not that I know of.

Q. You would have known it if there had been?

A. I should think so.

Q. You understood, didn't you, that when you paid these counsel that money it was in satisfaction of all services rendered by them in the case?

A. Yes, sir; as far as I was concerned.

Q. As far as everybody was concerned, wasn't it?

A. Well, I don't know what anybody may have done outside of me. So far as I represented the situation here, I know of no other bills.

Q. You represented the two companies here, didn't you?

A. Well, necessarily they centered in me.

Q. What I am getting at is: These bills covered all the services rendered by the counsel in the case?

A. I don't know of any other services or any other bills made.

Q. Well, you knew that is a fact, didn't you, when you paid these men this large sum of money it paid them in full for everything they had done in the case?

A. I don't know of any other bills or any other charges.

Q. Why did you pay Hurd & Dunlap just as much as you did the other gentlemen for the same services?

A. I paid them the charge they made.

Q. So you paid anybody the charge they made, whatever it may have been?

A. No, sir; I did not.

Q. Well, with one exception. What is the reason you did not get

your money from Coffin & Stanton and Woodbury & Moulton i
mediately upon the injunction being dissolved?

A. I can only state what they stated to me. They claimed to
that they had made sales sufficient and had funds sufficient to h
paid me in full on the tenth day of February, but that parties h
cancelled their orders for bonds subsequent to that, pending the
junction, and that they must have some time in which to make th
payments after the matter was finally settled, after the injunct
was dissolved, and I gave them time and got it — payments alo
different times. It run several months before I got it entirely.

Q. By these bonds you mean the bonds of the new company?

A. Yes, sir; I suppose so. That was their statement to me.

Q. That was your own understanding?

A. I assumed that was it.

32 Q. What was the earnings of the company from the fi
day of January up to the time they finally turned over t
property to Coffin & Stanton?

A. Of the year 1890?

Q. Yes.

A. Well, I don't know what they were. I think they were in e
cess of the interest on the amount which they paid me or were
pay me. I don't remember, but I presume they were. Those p
ments came semi-annually, and the first of January there would
a large amount.

Q. It was in excess of the interest on the deferred payments y
had?

A. I think probably it would be a little over.

Q. This company at that time was earning more than enough
pay interest on five or six hundred thousand dollars' earning—no
mean?

A. Well, in a sense the company was. The facts were that
earnings were taken as fast as they were made over and above p
ing interest on one hundred and twenty thousand dollars of inde
edness. All the other earnings were continually put into extensio
At the time I sold the works the city was demanding extensions t
would have cost us forty-five or fifty thousand dollars. So the ea
ings of the company were not paid to the stockholders; divide
were not being made.

Q. What became of that fund? If it did not belong to the sto
holders, who did it belong to?

A. I don't understand.

Q. The earnings of the company.

A. During what period?

Q. From the first of January up to the time that the property w
turned over to Coffin & Stanton.

A. Coffin & Stanton, under the contract, were to receive the ea
ings from the first of January.

Q. They had not any contract with the new company, howev

A. Oh, no, sir; not as to that.

Q. That was a separate matter?

A. It was a matter between themselves and me. That was p

of the sale. They were to pay me interest on the $500,000, and they were to receive from January first up to February tenth the earnings of the business, or I was to account to them. The earnings went in. They did not receive anything, as a matter of fact, until they got possession of the property.

Q. When they did get possession they got all the earnings?

A. Yes, sir; everything was account- for to them.

Redirect examination.

Questions by Mr. LOOMIS:

Q. What did the interest amount to that you got of Coffin & Stanton?

A. The interest I was to receive from them on the tenth of February is what you mean?

Q. Yes.

A. $3,333.33 is my recollection.

Q. That was paid you at the time you settled with them in addition to the $500,000?

A. Yes, sir. After the injunction was dissolved they owed me on the tenth of February $503,333.33.

Q. Now, you say, in answer to Mr. Smith's question, that you employed these attorneys to represent you, and that in representing others they did so by virtue of your employment and represented the others incidentally. What do you mean by that?

A. I mean I employed them for myself, to do whatever would be necessary in the matter, and I did not employ them for anybody else.

Q. And in representing the others incidentally, do you mean by that that it was for the purpose of protecting your interests?

A. Solely; yes, sir.

Q. Were any of the attorneys other than Mr. Williams employed to represent you on the merits of the case?

A. No, sir.

Q. Did they appear in the case after the disposition of the injunction?

A. No, sir; not to my knowledge.

Q. Did they charge you for any services after the temporary
33 injunction was dissolved or for anything other than services connected with the injunction?

A. No, sir; the amounts paid them was solely for the injunction.

Q. So far as you know, did they make any charge against the other defendants for representing the other defendants in the case?

A. Not that I know of.

Q. So far as you know, did these other defendants pay these attorneys you employed for representing them in the case in any phase of it?

A. No, sir; I think not.

Q. Now, Mr. Mulvane, you spoke about being bankrupt or ruined if this temporary injunction had not been dissolved in a short time

after it was granted. I wish you would state what, if any, obligations you incurred in transferring these options into actual purchases of stock after the restraining order was issued.

A. I assumed obligations by reason of this transaction in the amount of three hundred and forty thousand dollars. I borrowed of the banks twenty-seven thousand dollars. I gave my notes to various persons for the purchase of stock or had my notes out for two hundred and sixty-three thousand or thereabouts. I had received from Coffin & Stanton fifty thousand, so that I had in this business and was liable for three hundred and forty thousand dollars.

Q. And these obligations were incurred for what purpose?

A. For the purpose of carrying out my contract with Coffin & Stanton and turning over to them the property—the stock.

Q. Well, they were incurred for the purpose of enabling you to get possession of the stock so you could comply with the contract?

A. Yes, sir.

Q. Now, Mr. Mulvane, I wish you would state to the jury whether or not you would have been able to meet those outstanding obligations if the injunction had been continued in force, say, until the next term of court.

A. I don't see how I could. I think I could not.

Q. How were those obligations secured; what evidence did you give of those obligations that you assumed?

A. Notes for a short time.

Q. How long did they run?

A. Thirty, sixty, and ninety days; mostly short periods. I think perhaps I had one or two as long as six months.

Q. What did you say the total amount of these obligations were?

A. $340,000; that is not including the $50,000 which I had of Coffin & Stanton, which I was liable to be called upon to return them if I failed to comply with my contract, and was also liable to suit for damages.

Q. What did you have to meet these obligations in the event of being unable to collect the money due you from Coffin & Stanton and Woodbury & Moulton?

A. Well, I had no ready means; I had some property.

Q. Was it valuable enough to meet these obligations?

A. No, sir; it would not have been.

Q. To what extent could you have met these obligations by other property which you had then at that time?

A. Well, that is hard to answer, but I think it would have been impossible to meet the emergency.

Q. Then if this temporary injunction had not been dissolved you would have found it impossible to meet your outstanding obligations?

A. That was the feeling I had about it. I felt so, and I am quite sure and satisfied that I could not have done it.

Q. Is that what you meant when you said you would have been ruined if the temporary injunction had not been dissolved?

A. Yes, sir.

34 Q. Now, what assurance, if any, did you have that Wescott & Hanson were financially able to carry out any judgment which the court might have rendered specifically enforcing the contract which they claimed to have had with you upon the theory that the court had entered judgment or decree of that kind?

Counsel for the defendant objected to the question as calling for incompetent, irrelevant, and immaterial testimony. The court sustained the objection; to which ruling the plaintiff excepted at the time.

Q. At the time you entered into this preliminary contract with Wescott & Hanson, in Boston, on December 14, 1890, and afterwards met on the following Monday for the purpose of drawing up formal contract, as you have already testified in answer to questions submitted by Mr. Smith, state whether or not Wescott & Hanson were prepared or were willing to pay you sixty thousand dollars called for in that contract.

Counsel for the defendant objected to the question as calling for incompetent, irrelevant, and immaterial testimony. The court overruled the objection; to which ruling the defendant at the time excepted.

A. They were not prepared. They utterly refused to pay the sixty thousand dollars.

Q. After the temporary injunction was dissolved, did you, as a matter of fact, turn over all the capital stock of the Topeka Water Company and Topeka Water Supply Company to Coffin & Stanton in accordance with your contract with them?

A. I did.

Q. That delivery was made to them about what time?

A. Well, in April, immediately after the injunction was dissolved. I can't give you the date now without looking up the records.

Q. What assurance did you have from Coffin & Stanton and Woodbury & Moulton that they would not sue you for damages in the event that the contract with them had been permanently enjoined?

Counsel for the defendant objected to the question as calling for incompetent, irrelevant, and immaterial testimony. The court sustained the objection; to which ruling the plaintiff at the time excepted.

Q. Did you, as a matter of fact, employ any of these attorneys for the purpose of representing either of these water companies?

A. I did not.

Q. You said in answer to a question propounded by Mr. Smith that you wanted to defend the suit generally. Who did you employ for the purpose of representing you on the merits of the case, for the purpose of defending the suit generally?

A. Mr. A. L. Williams.

Q. Was he the only one?

A. Yes, sir; on the merits of the case generally. The employment

of all the other attorneys except Mr. Williams was in the preliminary or in the matter involved in the injunction, and when that was accomplished I employed Mr. Williams, as the suit was retained, a suit for damages against me on the part of the plaintiffs. I employed Mr. Williams to go on with the suit as to its merits, and he is the only one.

Q. If an injunction had not been sought or obtained in the case, was there anything in the case generally, outside of the injunction, that would have prevented you from carrying out your agreement with Coffin & Stanton and Woodbury & Moulton? Would the pendency of the suit itself, without the injunction feature, have prevented you from carrying out this contract in any way?

A. There was nothing that I knew of but the injunction.

Q. You did finally carry it out while the suit was pending on the merits?

A. Yes, sir; I was prepared to carry it out on the tenth day of February, before the injunction was dissolved. I was prepared, I think, as early as in January, but was waiting for the time.

35 Q. When you made the contract with Wescott & Hanson in Boston, December 14th, 1889, did you own all the capital stock of the Topeka Water Supply Company?

A. No; I did not. There was some of the stock that I did not succeed in getting transferred to me in blank.

Q. Did you have options on a large portion of it?

A. Yes, sir; I think all but about one hundred and twenty shares.

Q. And that you never owned, only had options upon?

A. No, sir.

Q. But you secured it all in time to comply with your contract with Coffin & Stanton?

A. Yes, sir; I secured the final amount, I think, in the early part of January.

Q. When Wescott & Hanson refused to pay the $60,000 in accordance with the agreement of December 14th, what did you do with reference to declaring the trade off?

A. I declared it off on the basis that they refused to pay me the money and asked things that I did not care to do. In the preliminary agreement they asked me to deliver the stock which I did not have and which they fully understood I did not have.

Q. You spoke about D. W. Mulvane's trip to New York being on March 1st. Please look that up and see if the first trip was not made on February 7th.

A. Well, the payment was made on March first, I think.

Q. When was the payment for the first trip made?

A. The payment was made March first, 1890.

Q. When was the other payment made?

A. The first payment was made February 7, 1890.

Q. The first trip was made after the restraining order was issued?

A. Yes, sir.

Q. And before the temporary injunctions?
A. Yes, sir.
Q. And the next trip was made after the temporary injunction was granted?
A. Yes, sir.

Recross-examination.

Questions by Mr. SMITH:

Q. Were not Wescott & Hanson seeking to enforce this contract that they made with you? Was not that the object of this suit that was brought?
A. That was what it purported to be.
Q. They tendered performance on their part of the contract, and didn't they, when they found they could not give bond here on account of the friendly interests of the bankers of this town with your brother—didn't they come forward and place $75,000 in the clerk's hands?
A. The records show what they did.
Q. Well, is not that true?
A. I understood they did.
Q. You saw it put up in court, didn't you?
A. I saw the money handled there; I did not count it; I supposed that was it.
Q. Then, even if the injunction had been made permanent and you had been compelled to comply with this contract, you would not have been ruined, would you? You would have got five hundred thousand and made a profit of one hundred thousand out of this transaction, wouldn't it?
A. I had reason to think they could not comply with that contract and would not. They were trying to hold me up.
Q. Did you have reason to think that after they brought into court $75,000 in cash and put it up?
A. That was done by the Maverick bank, Mr. Potter, and not by them.
Q. Were you not tendered by them through myself as their attorney a contract and asked you to comply with it?
A. I think you tendered me some paper which I did not examine at all.
Q. You understood it to be the contract?
A. You said something as to what it was, but I did not examine it.
Q. Well, I don't see how you could be ruined by being compelled to comply with this contract and receive $500,000. Even by
36 that you would make $100,000.
A. I was liable to be sued any day after the tenth of February by Coffin & Stanton for damages in a large amount and to return them the $50,000, and I had not any assurance in the world that Wescott & Hanson would comply with their contract. On the contrary, everything indicated that they would not do it, for

they refused to do it in Boston, and I had a right to assume they could not get the money.

Q. Did they not tender you a certified check for $60,000 at that time?

A. No, sir, they did not; they claimed they could get one, but they did not tender me anything.

Q. Didn't you arbitrarily turn them back and refuse to sign the contract, simply because you had got an offer of $50,000 more the night before?

A. No, sir; I spent a half a day with them trying to contract with them, and very reluctantly turned them down because they would not pay a dollar. They tried to get me into a contract which they knew I could not comply with.

Q. Hadn't you at that time an offer from Coffin & Stanton to pay an advance of $50,000 at the time you were in Boston, before you left there?

A. No, sir.

Q. Didn't you have a proposition from Coffin & Stanton to pay $550,000 for the entire capital stock of this plant before you left Boston?

A. No, sir.

Q. When did you get it?

A. I got it in New York city on the 18th day of December.

Q. Well, didn't you have a proposition from them to come to New York, that they would pay an advance?

A. No, sir.

Q. Didn't you get a telegram from them?

A. I may have got a telegram, but I had no proposition.

Q. Why did you go there then?

A. I went over there because they wanted an opportunity to buy the property.

Q. You went over there and in twenty-four hours closed a contract with them?

A. I closed it as soon as I felt I could.

Q. But inside of twenty-four hours after you got there?

A. Yes, sir; I think it was.

Q. Then I don't see how you would have been ruined if you had been compelled to comply with this contract.

A. They could not pay it. It was as the Asa P. Potter revelations showed: the whole outfit was rotten and went to pieces a little while afterwards.

Q. So did Stanton & Coffin?

A. Yes; but they paid me before they did.

Q. How much is this stock worth at this time—that is, the stock of this water company?

A. I don't know.

Redirect examination.

Questions by Mr. LOOMIS:

Q. Mr. Smith asked you if you were tendered $75,000 or spoke about being tendered $75,000 by him or somebody representing Wescott & Hanson?

A. No, sir; he never tendered me any money.

Q. Was there any money ever tendered to you by Wescott & Hanson?

A. No, sir; they refused to.

Q. Was there any assurance given to you by Wescott & Hanson that they would pay you $500,000 on their contract if the court should render a decree enforcing it?

A. Mr. Smith claims so, but I never saw any document of that kind.

Q. Did they ever show you any bond to pay any money or tender you any money?

A. No, sir.

Q. What assurance did you have that they could comply with this contract?

A. None. I found while in Boston that Mr. Hanson was nothing but a bond clerk in the Maverick bank—a man without means.

Q. If this $60,000 had been tendered to you, as they agreed
37 to give it to you in Boston, would you have entered into formal contract as you had agreed to do?

A. Yes, sir; I would have sold them on the spot.

(Witness excused.)

A. A. HURD, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows, to wit:

Direct examination.

Questions by Mr. LOOMIS:

Q. State your name.

A. A. A. Hurd.

Q. What is your business?

A. Attorney-at-law.

Q. How long have you been so?

A. Twenty-nine years.

Q. How long have you been practicing law in the State of Kansas?

A. Twenty-nine years in the State of Kansas.

Q. How long have you been located in Topeka?

A. This is my twentieth year in Topeka.

Q. State whether or not you and Mr. Dunlap were employed by Mr. Joab Mulvane in the case of Wescott & Hanson against Mulvane and others, pending in the U. S. circuit court for the district of Kansas.

A. We were.

Q. State for what Mr. Mulvane employed you gentlemen in that case.

A. To assist in getting rid of the temporary injunction which had been granted in the Federal court to restrain him from turning over the stock of the Topeka Water Works Company to the firm of Coffin & Stanton, in New York, to whom he had contracted to sell and deliver it.

Q. Did Mr. Mulvane employ you to represent him on the merits of the case outside of the injunction matters?

A. Why, no, sir; not at that time. The object of the employment was wholly to get rid of the temporary injunction.

Q. After the injunction was got rid of who continued in charge of the case?

A. I don't know; I quit it after that; did not have anything to do with it after that.

Q. Is that true of Mr. Dunlap also?

A. I think so; yes, sir; if we rendered any services, it was something very slight, something we never made any charge for. We might have done some little thing after the order was made by Judge Caldwell dissolving the temporary injunction, but never made any charge for it.

Q. Then the charge which you and Mr. Dunlap made was for services exclusively in connection with the injunction proceedings in the case?

A. Yes, sir; in connection with the dissolution of the temporary injunction.

Q. Now, Mr. Hurd, you appeared for other defendants in the case than Mr. Mulvane. State how that happened.

A. I think possibly my name appeared as attorney for the Topeka Water Works Company. I don't know whether it did or not—the old company. I am not certain about that. I appeared for Mr. Mulvane. I did not appear for anything else. Anything I did was for the purpose of aiding Mr. Mulvane in procuring a dissolution of this temporary injunction. I was not employed by anybody except Mr. Mulvane.

Q. Then if your name and that of Mr. Dunlap appears representing other defendants in the case was it solely by virtue of your employment by Mr. Mulvane?

A. Yes, sir; we were not employed by anybody else; did not consider ourselves attorneys of anybody else and did not make any charge against anybody else.

Q. Do you know what your object was in appearing for these other defendants?

A. I think Mr. Mulvane was president of the old water works company. That company, I think, was a party and was enjoined in the matter. I think he requested us to represent that company at the same time we represented him.

Q. And the object in doing so, in appearing for them, was what?

38 A. The object was to get rid of this injunction, so Mr. Mulvane could carry out his contract with Coffin & Stanton.

Q. It was all, then, in the interest of Mr. Mulvane?

A. Yes, sir; we presented our bill to Mr. Mulvane and did not present any to anybody else.

Q. Examine that and state if that is the bill you presented.

A. Yes, sir; that is the bill.

Q. What is the amount of it?

A. $6,000.

Q. Who was it paid by?

A. It was paid by Joab Mulvane.

Q. What was the idea in inserting the names of the other parties?

A. I don't remember now, unless it was, as I say, at Mr. Mulvane's request: we had acted as attorneys for these other parties also. In fact, my remembrance would have been that the other names were not inserted.

Q. You understood that you were merely representing Mr. Mulvane?

A. Yes, sir.

Q. And representing these other parties to further his interest?

A. Yes, sir; at his request to further his interest.

Q. Now, I will ask you whether or not in your opinion the amount charged by you and Mr. Dunlap was a reasonable amount for the services performed by you in the case.

Mr. HISTED: We make the same objection as we made this morning to testimony on the subject of attorneys' fees.

The court overruled the objection; to which ruling the defendant at the time excepted.

A. Yes, sir; I think it was.

Q. Do you remember the amount charged by Mr. McFarland?

A. Why, my understanding was that he charged $6,000. I will not be certain about it.

Q. What, in your judgment, would have been a reasonable charge for Mr. McFarland to make for his services to Mr. Mulvane?

A. I think $6,000 would be a reasonable charge for his services rendered Mr. Mulvane. In fact, I think a considerably larger charge from him and from Dunlap and myself would have been reasonable. I think there could have been a charge of ten thousand dollars and been very reasonable.

Q. Why do you state that?

A. On account of the character of the case, the amount involved, and what it amounted to to Mr. Mulvane to get rid of it.

Q. What do you consider the amount involved?

A. The amount involved was very large, when you take into consideration the character of the case and the surrounding circumstances. The plaintiffs alleged that Mulvane had agreed to sell them the stock of this company and transfer it to them for an amount—I think five hundred thousand dollars. Anyway, there was a difference between the amount they claimed and the amount at which he had contracted to sell it at of $50,000. He had received $50,000 more from Coffin & Stanton than he would — received from the plaintiffs in this injunction suit if they succeeded in compelling him

to carry out the contract and if they were able to carry it out; and in addition to that, Mr. Mulvane would have been subject to suits for damages by Coffin & Stanton, which in my opinion could very readily have been shown to be $250,000 to $300,000 if he had not been able to carry out the contract which he had made with them and which he was anxious to carry out. In addition to that, if he was not able to dispose of the temporary injunction so that he could carry out the contract, it would have been only a very short time until other damages would have accrued, and Mr. Mulvane could not have escaped from the payment of those damages unless it was
39 through bankruptcy for the reason that the other arrangements were all made, as we knew at the time, and that was the reason we were in such a hurry and took every proceeding we could think of in consultation between all of us in order that Mr. Mulvane could carry out his contract with Coffin & Stanton, in order that they might carry out their contract with the parties that they had arranged to dispose of the bonds of the new company to at a large profit to themselves. They succeeded in that, and by that means Mr. Mulvane was relieved from suit for damages by Coffin & Stanton; that in addition to the fifty thousand dollars in cash which he was getting more than the alleged contract with the plaintiff in that suit. In addition to that, there was no certainty in my mind that if they were successful in maintaining this injunction that the plaintiffs would ever be able to pay that five hundred thousand dollars.

Q. Why was there no certainty upon that?

A. From the information we had as to their standing and character and financial ability, and I think the whole outfit became bankrupt shortly after that before the suit on its merits was finally disposed of.

Q. What, in your opinion, would have been a reasonable charge, in the aggregate, to make for attorneys' fees against Mr. Mulvane alone for services rendered to him in connection with the injunction proceedings in that case?

A. I think $25,000 would have been a very low fee to dispose of the temporary injunction in that case in time to save him from action by Coffin & Stanton.

Q. How many meetings did you have or hearings before Judge Foster?

A. I don't know; we had a good many, and we went to Little Rock and had another round before Judge Caldwell, and I guess that is the only case on record where Judge Caldwell has granted an (—) of that kind under the circumstances.

Q. Why was that?

A. It was because Foster was sitting as circuit judge at the time the order was made in Topeka, and it is a rule that the regular circuit judge will not interfere with an order of the district judge sitting as circuit judge.

Q. And it was considered necessary to get the circuit judge to take the matter up?

A. Yes, sir.

Q. Was there not an effort made on the part of Mulvane's attorneys, yourself, and others to get Woodbury & Moulton in the case before Judge Foster, so that the court might be ousted of its jurisdiction?

A. Well, we made the point, I know, that the court did not have jurisdiction because they were necessary parties and were not in the jurisdiction of the court.

Q. Was that point conceded by the attorneys on the other side?

A. I think it was resisted. I know they resisted every point we made.

Q. That point was presented before Judge Foster?

A. Yes, sir.

Q. Now, it appears that you and Mr. Dunlap prepared or signed and filed some appearances for some of the defendants in this case—answers, pleas, demurrers, and so on. I want to know whether or not, in your judgment, that was necessary or proper in pursuance of your employment to get rid of the temporary injunction.

A. I think it was proper, and some of the attorneys thought it was necessary to file all those motions and pleas, etc.

Q. Did Judge Caldwell take into consideration, in ruling upon the motion to dissolve, the pleadings and proof which had come in before the matter was presented to him?

A. It has been so long I don't remember what he did consider.

Q. I will call that to your attention.

A. Well, I have not seen it since it was made.

Q. Look at this (indicating) and refresh your recollection.

A. That is the order.

Q. Did Judge Caldwell rule upon anything except the motion to dissolve?

A. That was all.

Q. Now, after reading this order, state whether or not Judge Caldwell took into consideration the pleadings which had been filed in the case.

A. He undoubtedly must have done so in deciding it upon that question.

Q. What causes you to think that?

A. (The witness reads the order as contained in the record.)

Q. That was to postpone the consideration until when?

A. "Until the coming in of the pleadings and proof now before me on this subject."

Q. He justifies himself in taking it up after another circuit judge had taken it up, because in the meantime additional pleadings and proof had come in?

A. Yes, sir.

Q. Were there other motions to dissolve besides this?

A. My remembrance is that there were quite a number of motions filed. I think everybody connected with the case filed some kind of a motion to get rid of that injunction.

Q. You were there representing Mr. Mulvane?

A. Yes, sir; upon a motion to dissolve this temporary injunction.

Q. Did you argue it?

A. Yes, sir.

Q. Did all these various attorneys employed by Mr. Mulvane a pear in these various hearings?

A. I think so.

Q. Did they represent him?

A. Yes, sir. Mr. Dunlap was not there, but I was there. were acting together as partners.

Q. Did these attorneys represent Mr. Mulvane in this injuncti proceeding according to the best of their ability?

A. I think they did; they were successful, anyway.

Q. You worked pretty hard in the case?

A. Yes, sir; we did; all of us. We knew it was a matter of t utmost importance to Mr. Mulvane. We did everything we cou to get rid of that temporary injunction.

Q. If there was anything else you could have done you do know what it was?

A. No, sir.

Q. What in your judgment would have been a reasonable fee Mr. A. L. Williams to charge for his services in that case, in conn tion with the temporary injunction, exclusively for services render to Mr. Mulvane?

A. $5,000.

Q. How as to Mr. Hagan?

A. The same; probably a little more. Mr. Hagan came into t case before Mr. Williams did.

Cross-examination.

Questio is by Mr. SMITH:

Q. Are you still employed by Mr. Mulvane?

A. I am not.

Q. I infer from your making argument on the stand that y were still retained by him.

A. No, sir: I was asked my reason for thinking that was a reas able fee, and I stated why I thought so.

Q. When were you first employed by him?

A. O, I can't give the date, but shortly after the commenceme of that suit. I think the next day after the temporary restraini order was served.

Q. Do you know George P. Wescott?

A. I think I met him.

Q. Do you know Samuel Hanson?

A. I don't know whether he was here or not, was he?

Q. I don't know.

A. I don't know whether I met either of them or not. In fact don't think I did. I don't think either of them was here after t suit was commenced.

Q. Do you know anything about them at all?

A. Only what I have heard.

41 Q. What have you heard to justify you in saying they a bankrupt?

A. I heard the Maverick bank had failed.

Q. What has George P. Wescott, who lives in Portland, Maine, to do with that bank?

A. Well, the other man is a clerk in the Maverick bank.

Q. What of that?

A. They attempted to prove in this case that the Maverick bank was behind them and was going to furnish the money. I don't know anything about Wescott personally, but I say my understanding was that the whole outfit had failed.

Q. Didn't you say on the witness stand he had failed?

A. I said I understood they had failed—that is, the Maverick bank.

Q. Didn't you intend to have the jury think Wescott and Hanson had failed or were insolvent?

A. It was proved in this case that the Maverick bank was backing them and they were expecting to get the money there.

Q. Then you did not intend to give the jury that impression?

A. As far as my own knowledge is concerned, I know nothing about him.

Q. What do you know about Hanson?

A. They said he was a man of no financial ability.

Q. Who said that?

A. Evidence to that effect was produced.

Q. What for?

A. I don't remember.

Q. Turn to the record.

A. I don't remember whether there is any. I know that the statement was made that they relied upon the Maverick bank to get the funds, and this man Hanson was simply a clerk in that bank.

Q. Why do you say to the jury that Wescott & Hanson were insolvent?

A. I did not say they were insolvent or bankrupt. I said I did not believe they would be able to carry out the alleged contract with Mr. Mulvane.

Q. Why do you believe that?

A. Because it was stated somewhere in that case they were relying upon the Maverick bank to get the money to carry out the contract, and before this suit was disposed of on its merits that bank had failed.

Q. Wasn't the bank failure not for a year after this time?

A. I can't give you the date.

Q. Don't you know that bank was one of the strongest banks in this country when this litigation was commenced?

A. I don't know; I can't tell you.

Q. Why employed you?

A. Joab Mulvane.

Q. He employed you and Mr. Dunlap?

A. He employed the firm; he spoke to me personally.

Q. Did you have a partnership?

A. Yes, sir.

Q. What other business were you engaged in?

A. I was attorney for the Atchison, Topeka & Santa Fe Railro Company.

Q. What was Mr. Dunlap's position?

A. He was attorney also of the same company.

Q. Both drew salaries from that company?

A. Yes, sir; and both had the privilege of doing outside busine too.

Q. What did Mr. Mulvane state to you when he came to empl you?

A. He said he wished to hire me to consult with and confer wi Mr. McFarland and help to get rid of that temporary injunctio that was the substance of it.

Q. Were you not employed to defend the suit generally?

A. I don't think I was.

Q. Why did you file an answer to the merits then?

A. Because we did everything that was necessary to do in ord to get rid of that temporary injunction.

Q. You did not have to file an answer to the merits for that, d you?

A. I don't think we did, but in discussing these questio
42 some attorneys thought it wa*d* advisable to file certain pap that others did not think it was advisable to do, and in the discussions we decided to file anything anybody thought it w advisable to file.

Q. Was there intricate or novel questions of law involved in th controversy?

A. Well, I don't know but there was; yes, sir

Q. You knew as counsel for the defendant that Woodbury a Moulton were joint parties with Coffin & Stanton to this contra and you knew Mr. Woodbury was a citizen of the State of Mai being a citizen of the same State as one of the complainants in th case; you knew that fact?

A. Yes, sir.

Q. You knew Woodbury & Moulton were necessary parties terminate the controversy?

A. We thought so.

Q. When did you learn that fact?

A. I don't know just when it was; some time after we first co menced.

Q. Well, knowing that fact, then, didn't you know that upon th fact being brought to the attention of the Federal court that th cou*ld* would say, "This court is without jurisdiction," and, as a matt of course, dissolve the injunction?

A. We didn't succeed in getting it dissolved, as a matter course, when we first raised it here in Topeka.

Q. Because you did not have proof of the fact?

A. Well, we thought we had.

Q. Didn't you know, as a matter of fact, that the court would that?

A. I did not know whether it would or not; no, sir.

Q. You knew it if the court was convinced that Woodbury and Moulton were necessary parties to the suit?

A. If the court was convinced of that fact; yes, sir; but the trouble was to convince the court.

Q. Then all you had to do was to convince the court that Woodbury & Moulton were participating in this contract. Now, what great question was involved in that to justify you in testifying that a man would have a right to charge $25,000 for that?

A. It is not the importance of the question, but it is often the amount involved and the effect an adverse decision would have upon the client's interest.

Q. Then you would charge according to the possible effects of an adverse decision and not for the simple services rendered?

A. According to the services and because of the effect it would have on Mr. Mulvane's interest.

Q. So you believe in holding a man up and making him pay an enormous fee simply because he is unfortunate enough to be in a position to suffer in case of an adverse decision?

A. I think Mr. Mulvane would have been very glad to enter into a contract if we could have guaranteed the results to pay fifty thousand dollars for it; would have been very glad to do it. Mr. Mulvane never made any objection to the size of my fee. He said he was well satisfied with the service, gave me his check for it, and looked pleased.

Q. You were retained by him to represent the Topeka Water Works Company and the Topeka Water Supply Company?

A. Only incidentally.

Q. Well, I don't care how.

A. Yes, sir.

Q. You appeared and filed answers for them?

A. Yes, sir; whatever was filed.

Q. You filed a motion to dissolve the injunction?

A. Yes, sir.

Q. You made a general charge against Mr. Mulvane for all services rendered by you in the case. Now, Mr. Hurd, please tell the jury what you actually did. What labor did you perform? How many times did you go into court?

43 A. I can't tell you the number of times. We went in frequently, however.

Q. How do you justify, then, this enormous charge of this kind without being able to tell what service you rendered? Was it guesswork on your part?

A. No, sir.

Q. State what you did, then.

A. We filed all the necessary pleadings we thought ought to be filed. I don't remember what they were; I have not looked at the record.

Q. Don't you remember what you did in the case?

A. No, sir.

Q. You think getting an injunction dissolved in a big case would justify charging a man $25,000 attorneys' fee?

A. No, sir. I have a vague idea, but I don't remember the details of the pleadings filed in the case.

Q. Then you do say you made a charge of this large fee without knowing what services you rendered?

A. I knew what services I rendered at that time.

Q. What did you do?

A. Got rid of that temporary injunction with the other attorneys.

Q. It was not dissolved at all on the motion of Mulvane, but on the motion of the companies, was it?

A. I believe the motion on which the order was actually entered was *made by Coffin & Stanton.*

Q. Now, tell the jury what you did in this case.

A. Well, I have told you.

Q. To justify you in charging six thousand dollars.

A. Well, we got rid of that temporary injunction and enabled Mr. Mulvane to carry out his contract with Coffin & Stanton.

Q. And the mere fact of calling the U. S. court's attention—your entire services consisted, didn't it, in calling the attention of the U. S. circuit court or Judge Caldwell's attention to the fact that Woodbury & Moulton were necessary parties defendant to this case, and being necessary parties, and one of them being a citizen of the same State as one of the complainants in the case, and therefore the U. S. circuit court had no jurisdiction of the case and the injunction was dissolved; is not that the only thing you did?

A. No, sir; we tried to do the same thing before Judge Foster a number of times.

Q. Did you make an argument at all before Judge Caldwell?

A. Yes, sir.

Q. Who else?

A. Mr. Williams did. I think Mr. Jones made an argument. I don't remember now whether Mr. Hagan did or not. I remember after we got fairly started in the thing Judge Caldwell took the reins in his own hands and ran it the balance of the way.

Q. And did not let anybody have an argument after that?

A. No, sir.

Q. He would not let us open our heads, would he?

A. Yes, sir; he let you talk a while.

Q. He would not let me talk at all. Wasn't it a fact that as soon as he got the idea that that one fact existed, that there was a cocitizenship of complainant and defendant in the case, that he dissolved the injunction?

A. I think he did; yes, sir.

Q. Now, that is all the work you had to do, wasn't it?

A. No, sir.

Q. To bring the court's attention to that one fact; wasn't that the only question involved?

A. We had to look up the authorities to prove that was the law.

Q. Can you find an attorney upon the (*fact*) of the *the* earth who will not concede that if the party is a necessary defendant and is of the same citizenship as the plaintiff the court has no jurisdiction; can you find an attorney to dispute that fact?

A. I know you and Mr. Rossington did dispute it at that time before Judge Foster and Judge Caldwell.

44 Q. No, sir; never; not upon its being shown that he was a necessary party. Now, don't you remember anything you did in that case except that one thing?

A. I don't remember. We filed a number of different motions.

Q. Did you ever appear before Judge Foster?

A. Yes, sir.

Q. How many times?

A. Two or three times.

Q. *On what?*

A. On motions to dissolve and, first, to resist the granting of a temporary order.

Q. Are you not mistaken in that?

A. No, sir.

Q. Was not the restraining order granted without any notice?

A. The temporary restraining order was; yes, sir; then a day was set for the hearing of the temporary injunction and we appeared for that.

Q. Is not that the only time you appeared before him in that case?

A. No, sir; we were before him more than once, but it may have been a continued hearing of that one motion.

Q. So you think the only time you ever appeared before Judge Foster at all was on motion to dissolve the temporary injunction?

A. No, sir.

Q. And the only time you ever appeared before Judge Caldwell at all was when you went to Little Rock and brought to his attention the fact that the parties were citizens of the same State and he dissolved the injunction?

A. We went before Judge Caldwell once.

Q. How much labor was involved by you in preparing this motion and how much time was consumed by you in appearing before Judge Foster and Judge Caldwell?

A. We worked on the case continuously from the time we were employed until it was finally disposed of—two or three or four weeks. I don't know how long; all the time we were not engaged in other matters, in the daytime and in the evenings.

Q. You performed your duties as general solicitor for Kansas of the Santa Fe road?

A. Yes, sir.

Q. And Mr. Dunlap performed his duties?

A. Yes, sir.

Q. You did not let this private business of yours interfere with your business as to the company?

A. No, sir.

Q. You did not consume very much time on it, then?

A. Yes; we did.

Q. Did you consume six hours' time?

A. Yes, sir; a good many more than that. We worked very hard on that case, and I think you did the same on the other side.

Q. How long have you known the proposition of law that where

a controversy is between the citizens of the same State the Federal court has no jurisdiction?

A. I think we found it out about the time we were looking up that case. The construction which was placed on that law by Judge Brewer was the first intimation I had that that was the law.

Q. You say you were justified in charging this man six thousand dollars for filing this motion and having the court's attention called to it and having the court say that it did not have jurisdiction?

A. I think so.

Q. What salary were you getting from the Santa Fe road?

A. I don't know as that has anything to do with this case.

Q. I think it has.

Counsel for the plaintiff objected to the question as calling for incompetent, irrelevant, and immaterial testimony. The court overruled the objection; to which ruling the plaintiff at the time excepted.

A. I don't remember at that time.

Q. Well, you were not getting twice that amount, were you?

A. No; I did not get twice that amount.

45 Q. You were not getting more than one-third in excess of that amount?

A. I don't remember what I was getting at that time. I know what I am getting now.

Q. Well, I don't care anything about that. Do you say you were working for a corporation at that time and don't know what they were paying you?

A. I don't remember what they were paying me at that time.

Q. You were supposed to give your entire time and attention to that work?

A. My salary has varied at various periods.

Q. You had general charge of the entire litigation of this great corporation in Kansas, hadn't you?

A. Yes, sir.

Q. At the same time you had general charge and control of the entire litigation of the St. Louis & San Francisco road in this State at that time?

A. Yes; I think I was attorney of that road at that time, but I did not get anything for that, however.

Q. And the interests of these corporations amount to a great many millions of dollars, and you were their adviser and looked out for all their litigation?

A. I did; yes, sir; in the State of Kansas.

Q. And still you say, do you, that for a simple motion to dissolve an injunction on the ground that the court has not jurisdiction you would be justified in charging a client half or two-thirds as much as the amount of money that you get for your whole year's services to this corporation?

A. I certainly do. Considering the amount involved and the circumstances connected with it, the conditions, and so forth, it might be worth a great deal more to do one hour's work in the case than it would be to work a year on other classes of service with other conditions existing.

Redirect examination.

Questions by Mr. LOOMIS:

Q. This point with reference to Woodbury & Moulton being residents of the same State with one of the complainants, was that brought up before Judge Foster?

A. We tried to bring it up before him.

Q. Was it suggested in open court that they were residents of the same State.

A. Yes, sir; it was argued there.

Q. Was it argued in the presence of Rossington, Smith & Dallas?

A. Yes, sir.

Q. Did they offer upon that suggestion being made to dismiss the case?

A. No, sir.

Q. Did they offer at any time to dismiss the case?

A. No, sir.

Q. Notwithstanding the fact it was brought to their notice and attention that the court would be ousted of jurisdiction, they still persisted in pursuing their injunction?

A. Yes, sir.

Q. While you were connected with the Santa Fe and getting a salary from them, were you or were you not permitted to take outside business?

A. I was.

A. H. HORTON, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

Questions by Mr. LOOMIS:

Q. State your name to the jury.

A. Albert H. Horton.

Q. What is your business?

A. I am an attorney-at-law.

Q. Where are you now located in the practice of law?

A. In this city.

Q. How long have you been engaged in the practice of law, Judge?

A. I have been judge and practicing law for thirty-seven years in Kansas.

Q. How long were you chief justice of the State of Kansas?

A. 18 years.

Q. The balance of the time have you been engaged in the active practice?

A. A short time I was district judge.

Q. For how long a time?

A. Five years.

46 Q. What, in your opinion, would be a reasonable attorneys' fee for legal services rendered under the following state of

facts: Upon December 14, 1889, Wescott & Hanson entered into an agreement with Joab Mulvane, whereby Mulvane was to convey to them all of the capital stock of the Topeka Water Supply Company for the sum of five hundred thousand dollars. Sixty thousand dollars of this amount was to be paid in cash upon the execution of a formal contract. Two days afterwards the parties met for the purpose of executing the formal contract. At that time Wescott & Hanson refused to make the sixty thousand dollars cash payment in accordance with the agreement of December 14th, and Mr. Mulvane declared the contract off. He thereupon entered into a contract with Coffin & Stanton and Woodbury & Moulton to convey to them the capital stock of the Topeka Water Supply Company for the sum of five hundred and fifty thousand dollars. A fifty thousand dollars cash payment was made to Mr. Mulvane. The balance, amounting to five hundred thousand dollars, was to be paid and the capital stock of the water company was to be delivered by Mr. Mulvane to the purchasers upon February 10, 1890. Five days before the contract between Coffin & Stanton and Joab Mulvane was to be consummated, to wit, upon February 5th, 1890, Wescott & Hanson brought suit against Mulvane and others in the circuit court of the United States for the district of Kansas for the purpose of specifically enforcing the agreement entered into between them and Mulvane, above referred to, and for the purpose of enjoining the execution of the contract entered into between Mulvane and Coffin & Stanton *et al.* A restraining order without bond was issued upon the filing of the suit, restraining Mulvane from carrying out his contract with Coffin & Stanton pending the hearing upon an application for a temporary injunction, which was set for February 12, 1890. At the time Mr. Mulvane entered into the contract with Coffin & Stanton *et al.* he (Mulvane) had secured, in addition to the stock owned by him, options on about thirty-four hundred shares of the capital stock of the water company at par, the par value of each share being one hundred dollars. These options would have enabled Mr. Mulvane to have secured the stock and carried out his contract with Coffin & Stanton if the execution of the contract had not been enjoined. When the temporary injunction was issued Mr. Mulvane found it necessary to make absolute purchases of the shares of stock for which he had options, and to do so was compelled to incur obligations amounting to about three hundred thousand dollars, for which short-time notes were given. Mr. Mulvane's financial condition was such at the time the temporary injunction was granted that if it had been continued in force until the end of the litigation on the merits, or if it had not been dissolved within a short time after it had been granted, he would have been unable to meet his outstanding obligations and would have been bankrupted. To enable him to carry out his contract with Coffin & Stanton and others and to prevent his absolute bankruptcy, Mr. Mulvane employed Eugene Hagen, J. D. McFarland, and Hurd & Dunlap, lawyers of this city, for the sole purpose of preventing the allowance of the injunction and to obtain its dissolution, if one should be granted. These lawyers made full preparations to oppose the issuance of a temporary injunction and did oppose it to the best of

their ability. One of the grounds urged against an injunction was that Woodbury & Moulton, who were par-
47 ties to the contract enjoined, were necessary parties defendant; that one of them was a citizen of the same State as one of the complainants and when made a party defendant the court would be ousted of its jurisdiction. Another point urged was that complainants had no contract with Mulvane which could be enforced, and therefore that they were not entitled to an injunction. After full argument and consideration Judge Foster granted a temporary injunction (*injunction*) upon February 13th, 1890, and fixed the bond at seventy-five thousand dollars, which was given. *Immediately* thereafter motions were filed to dissolve the injunction and preparations made to call up the motions before Judge Caldwell at Little Rock. An effort was also made by Mulvane's attorneys before Judge Foster to have Woodbury & Moulton, who were citizens of the same State as one of the complainants, brought into the case as parties defendant, and thereby oust the court of its jurisdiction. Judge Foster, however, ruled against Mulvane on this point. After the temporary injunction was granted and before the effort was made to have Woodbury & Moulton made parties defendant A. L. Williams, lawyer, of Topeka, was also employed by Mr. Mulvane for the purpose of assisting in procuring a dissolution of the temporary injunction. The motions to dissolve were fully argued before Judge Caldwell, at Little Rock, and the injunction dissolved upon the ground that Woodbury & Moulton were necessary parties defendant; that when they were brought into court jurisdiction of the case would be lost because one of them was a citizen of the same State as one of the complainants.

The complainants Wescott & Hanson were representing other parties in the negotiations with Mr. Mulvane for the purchase of the Topeka Water Company stock—they were not to invest a dollar of their own money in the deal—and when it came to carrying out the preliminary arrangement made upon December 14, 1889, by executing a more formal contract the parties whom Wescott & Hanson represented refused to make the sixty thousand dollars payment in accordance with the terms of the agreement. There were other defendants in the case, and the attorneys employed by Mr. Mulvane in pursuance of such em*pol*yment appeared for them in order to better protect Mr. Mulvane's interests and prevent the allowance of the temporary injunction. They were not employed by these other defendants and made no charge for services against them. In their efforts to prevent the allowance of the temporary injunction and to obtain its dissolution Mr. Mulvane's attorneys filed answers and other pleadings in the case. After the injunction was dissolved Mr. A. L. Williams alone appeared as attorney for Mr. Mulvane and tried the case for him on its merits, for which he made a separate charge not connected with the charge made for services rendered in obtaining a dissolution of the injunction. Now, taking into consideration the nature of the case, the amount involved, the results which would probably have flowed from an adverse decision, including a possible lawsuit with Coffin & Stanton *et al.* for breach of contract, the pro-

fessional standing of the attorneys employed by Mr. Mulvane, the results obtained by them, and all other circumstances connected with the case, as stated in the foregoing, what, in your opinion, would have been a fair and reasonable attorney's fee in the aggregate for the services performed by Mr. Mulvane's attorneys in his behalf in resisting the allowance and obtaining a dissolution of the temporary injunction?

48 Mr. SMITH: The defendant objects to the question as incompetent, irrelevant, and immaterial, argumentative *in form* and containing misstatements of facts, misleading and contrary to the testimony already offered by the plaintiff in the case, and because the statement contained in it forms no correct basis to enable the witness to testify as to the value of the services rendered in the case in which suit was brought.

The court overruled the objection; to which ruling of the court the defendant at the time duly excepted.

A. I would say twenty thousand dollars would be a reasonable fee.

Q. Are you acquainted with J. D. McFarland, Eugene Hagan, Hurd & Dunlap, and A. L. Williams?

A. Yes, sir.

Q. How long have you known them?

A. Some of them I have known for twenty-five years or longer; others for ten or fifteen years.

Q. Have you known them as attorneys, practicing lawyers?

A. Yes, sir, and practicing also. I based my estimate of the reasonable value upon their character and standing. I do not believe that Judge Caldwell or any other judge would have taken up the case after it had been decided and disposed of by Judge Foster excepting for the ability and standing and influence of those particular lawyers.

Counsel for the defendant moves the court to strike out the answer of the witness as to the value of services.

Q. Is that the only element you take into consideration?

A. No; I took into consideration the facts you read in the question.

Q. All the facts set forth in the question?

A. Yes; but I say, in *in* addition to that, the ability of the lawyers aside from that stated in the question, would in my opinion have very much to do with the final result obtained.

Mr. SMITH: The defendant moves the court to strike out the testimony with reference to the value of services for the reason that the witness was asked a question upon a statement of facts, and he has augmented that statement of facts by putting in other consideration not covered by the question. The court overruled the objection; to which ruling of the court the defendant at the time duly excepted.

Cross-examination.

Questions by Mr. SMITH:

Q. Your answer is based upon the fact that all the statements made in the hypothetical question are true?

A. Yes, sir, of course.

Q. If it should appear, for instance, that Mr. Mulvane would not have lost his entire fortune if this injunction had been sustained, that would reduce the fee?

A. Would reduce *the fee, of* course.

Q. Do you deem it necessary in ordinary cases for the appellant to employ half a dozen lawyers?

A. No; I do not always deem it necessary in ordinary cases to do so, and yet in cases involving great peril to a client I believe it is the custom and practice to do so very often.

Q. Is it your experience that a multitude of counsel in a case results generally disastrously to the interests of a client?

A. I sometimes think two firms are sufficient for any case, if they are able, competent lawyers.

Q. Don't you think two gentlemen at the bar of high standing, integrity, and recognized professional ability are all that is necessary?

A. Generally so, so far as the case is concerned. It may be necessary to have associate counsel in the way of preparing evidence and taking depositions, but in the considerations of this case it seems to me the action of Judge Caldwell was a little unusual, and therefore the ability and number of counsel undoubtedly had a good deal to do with that result.

49 Q. Don't you think the judge's arbitrary notion had a good deal to do with it?

A. I know the judge took action which was quite unusual to take, and yet it resulted for the benefit of the client, and the numerous counsel, I believe, had very much to do with that result.

Q. Do you think the number of counsel down there had anything to do with it?

A. I think they necessarily did. In my practice a United States circuit judge is very slow to take any action against a district judge who is acting as circuit judge. When I wanted to do it in one case the judge said it was an indecent thing to do.

Q. I quite agree with you on that. It was an unusual proceeding undoubtedly. Is that an element that you think would probably enter into an attorney's charge?

A. I think the ability of the counsel largely induced that decision.

Q. Was it necessarily the ability of the counsel or was it the dogmatic action of the judge himself that induced it?

A. That is a question of mere opinion. I was not present.

Q. Whatever was the cause of it, you think that added a good deal, augmented the fact?

A. I think the ability of counsel had a good deal to do with procuring that decision.

Q. I am asking if the result or action of the judge is not an element that you take largely into consideration in fixing the fee as large as you do.

A. The result which was obtained by the action of the judge, I do.

Q. You don't know anything about how much time was consumed by those gentlemen in this case?

A. I only know by the statement.

Q. All you know is from the statement read by Mr. Loomis?

A. Yes, sir; and the ability of counsel which I know.

Q. If this statement should prove untrue, then your testimony would not be based on anything else except this?

A. No, sir.

Q. Would that fact that these gentlemen mentioned in the statement appeared for other defendants in the case—for instance, suppose they were employed by Mr. Mulvane individually, and then they were employed for Mr. Mulvane as president of the Topeka Water Supply Company, and then by Mr. Mulvane as president of the Topeka Water Company—two companies of which he was president—and they also appeared for other defendants, Coffin & Stanton, and filed answers and appeared for all the parties to this suit, representing all four of the defendants, would that change your view about the value of services rendered?

A. It would if they were employed by them—that is, it would not change the value of the services, but change the question as to who should pay them; but if Mulvane employed them and they did this under his services or direction, with the understanding that he was to pay them, then, of course, the question of payment—then, of course, Mr. Mulvane would be the party liable.

Q. Suppose there is no understanding about it at all; he simply says, "I will go on and take care of the suit," and these various counsel appear for four or five defendants, do you mean to say they are justified in charging twenty thousand dollars to each defendant?

A. If they appeared without authority for the defendants, with the understanding that Mr. Mulvane was to pay them, I don't think the other defendants should pay them, but if they appeared for the other defendants and represented them, then, of course, the various defendants should pay their share.

Q. Suppose they appeared with the authority of the presi-
50 dent of the two companies and represented Mr. Mulvane personally and represented the Topeka Water Supply Company, the *the* Topeka Water Company, and one of them also represented Coffin & Stanton, another defendant, should then the twenty-thousand-dollar fee be divided among the defendants or not?

A. That would all depend upon the character of employment.

Q. Your idea is twenty thousand dollars should cover the entire services rendered in the case?

A. For the injunction; yes, sir.

Witness excused.

A. BERGEN, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

Questions by Mr. LOOMIS:

Q. State your name to the jury.
A. Abram Bergen.
Q. What is your business?
A. Practicing law.
Q. How long have you been engaged in the practice of law?
A. Forty-one years, except six months out when I was a judge.
Q. How long have you been practicing law in Topeka?
A. In Topeka I have been practicing ever since the fall of 1882. That would be some fifteen years.
Q. Are you familiar with the practice in the Federal courts?
A. I know something of it. I perhaps am not as familiar as some people, and a great deal more familiar than the average lawyers.
Q. Are you acquainted with J. D. McFarland, Hurd & Dunlap, Eugene Hagan, and A. L. Williams, attorneys-at-law, of Topeka, Kansas?
A. I am.
Q. How long have you known them?
A. I have known them different lengths of time. I have known Mr. Williams since 1865. He has not known me.
Q. Fix a general period.
A. Known Mr. McFarland some twenty-seven years. I have known them all, more or less, for fifteen years.
Q. During that time have you been acquainted with their professional standing and ability as lawyers?
A. I have; yes, sir.

51 Q. What, in your opinion, would be a reasonable attorneys' fee for legal services rendered under the following state of facts: Upon December 14, 1889, Wescott & Hanson entered into an agreement with Joab Mulvane, whereby Mulvane was to convey to them all of the capital stock of the Topeka Water Supply Company for the sum of five hundred thousand dollars. Sixty thousand dollars of this amount was to be paid in cash upon the execution of a formal contract. Two days afterwards the parties met for the purpose of executing the formal contract. At that time Wescott & Hanson refused to make the sixty thousand dollars cash payment in accordance with the agreement of December 14th, and Mr. Mulvane declared the contract off. He thereupon entered into a contract with Coffin & Stanton and Woodbury & Moulton to convey to them the capital stock of the Topeka Water Supply Company for the sum of five hundred and fifty thousand dollars. A fifty-thousand-dollars cash payment was made to Mr. Mulvane. The balance, amounting to five hundred thousand dollars, was to be paid and the capital stock of the water company was to be delivered by Mr. Mulvane to the purchasers upon February 10, 1890. Five days before the contract between Coffin & Stanton and Joab Mulvane was to be con-

summated, to wit, upon February 5th, 1890, Wescott & Hanson brought suit against Mulvane and others in the circuit court of the United States for the district of Kansas for the purpose of specifically enforcing the agreement entered into between them and Mulvane above referred to, and for the purpose of enjoining the execution of the contract entered into between Mulvane and Coffin & Stanton *et al.* A restraining order without bond was issued upon the filing of the suit, restraining Mulvane from carrying out his contract with Coffin & Stanton pending the hearing upon an application for a temporary injunction, which was set for February 12, 1890. At the time Mr. Mulvane entered into the contract with Coffin & Stanton *et al.* he (Mulvane) had secured, in addition to the stock owned by him, options on about thirty-four hundred shares of the capital stock of the water company at par, the par value of each share being one hundred dollars. These options would have enabled Mr. Mulvane to have secured the stock and carried out his contract with Coffin & Stanton if the execution of the contract had not been enjoined. When the temporary injunction was issued Mr. Mulvane found it necessary to make absolute purchases of the shares of stock for which he had options, and to do so was compelled to incur obligations amounting to about three hundred thousand dollars, for which short-time notes were given. Mr. Mulvane's financial condition was such at the time the temporary injunction was granted that if it had been continued in force until the end of the litigation on the merits, if *if* had not been dissolved within a short time after it had been granted, he would have been unable to meet his outstanding obligations and would have been bankrupted. To enable him to carry out his contract with Coffin & Stanton and others and to prevent his absolute bankruptcy, Mr. Mulvane employed Eugene Hagan, J. D. McFarland, and Hurd & Dunlap, lawyers of this city, for the sole purpose of preventing the allowance of the injunction and to obtain its dissolution if one should be granted. These lawyers made full preparations to oppose the issuance of the temporary injunction and did oppose it to the best of their ability. One of the grounds urged against an injunction was that Woodbury & Moulton, who were parties to
52 the contract enjoined, were necessary parties defendant; that one of them was a citizen of the same State as one of the complainants, and when made a party defendant the court would be ousted of its jurisdiction. Another point urged was that complainants had no contract with Mulvane which could be enforced, and therefore that they were not entitled to an injunction. After full argument and consideration Judge Foster granted a temporary injunction (*injunction*) upon February 13th, 1890, and fixed the bond at seventy-five thousand dollars, which was given. Immediately thereafter motions were filed to dissolve the injunction and preparations made to call up the motions before Judge Caldwell at Little Rock. An effort was also made by Mulvane's attorneys before Judge Foster to have Woodbury & Moulton, who were citizens of the same State as one of the complainants, brought into the case as parties defendant and thereby oust the court of its jurisdiction. Judge Foster

however, ruled against Mulvane on this point. After the temporary injunction was granted and before the effort was made to have Woodbury & Moulton made parties defendant A. L. Williams, lawyer of Topeka, was also employed by Mr. Mulvane for the purpose of assisting in procuring a dissolution of the temporary injunction. The motions to dissolve were fully argued before Judge Caldwell at Little Rock and the injunction dissolved upon the ground that Woodbury & Moulton were necessary parties defendant; that when they were brought into court jurisdiction of the case would be lost, because one of them was a citizen of the same State as one of the complainants.

The complainants Wescott & Hanson were representing other parties in the negotiations with Mr. Mulvane for the purchase of the Topeka Water Company stock; they were not to invest a dollar of their own money in the deal, and when it came to carrying out the preliminary arrangement made upon December 14, 1889, by executing a more formal contract the parties whom Wescott & Hanson represented refused to make the sixty-thousand-dollars payment in accordance with the terms of the agreement. There were other defendants in the case, and the attorneys employed by Mr. Mulvane in pursuance of such employment appeared for them in order to better protect Mr. Mulvane's interests and prevent the allowance of the temporary injunction. They were not employed by these other defendants and made no charge for services against them. In their efforts to prevent the allowance of the temporary injunction and to obtain its dissolution, Mr. Mulvane's attorneys filed answers and other pleadings in the case. After the injunction was dissolved Mr. A. L. Williams alone appeared as attorney for Mr. Mulvane and tried the case for him on its merits, for which he made a separate charge not connected with the charge made for services rendered in obtaining a dissolution of the injunction. Now, taking into consideration the nature of the case, the amount involved, the results which would probably have flowed from an adverse decision, including a possible lawsuit with Coffin & Stanton *et al.* for breach of contract, the professional standing of the attorneys employed by Mr. Mulvane, the results obtained by them, and all other circumstances connected with the case, as stated in the foregoing, what, in your opinion, would have been a fair and reasonable attorneys' fee in the aggregate for the services performed by Mr. Mulvane's attorneys in his behalf in resisting the allowance and obtaining a dissolution of the temporary injunction?

53 Mr. SMITH: The defendant objects to the question as incompetent, irrelevant, and immaterial, argumentative in form, and containing misstatements of facts; misleading and contrary to the testimony already offered by the plaintiff in the case, and because the statement contained in it forms no correct basis to enable the witness to testify as to the value of the services rendered in the case in which suit was brought.

The court overruled the objection; to which ruling of the court the defendant at the time duly excepted.

A. The question, as I remember it, is, How much in the aggre-

gate was the value of all the attorneys' services mentioned in tha question in procuring the dissolution of the temporary injunctio in that case?

Q. I will repeat the latter part of it. Taking into consideratio the nature of the case, the amount involved, the results which woul probably have flowed from an adverse decision, including a possibl lawsuit with Coffin & Stanton *et al.* for breach of contract, the pro fessional standing of the attorneys employed by Mr. Mulvane, th results obtained by them, and all other circumstances connected wit the case as stated in the foregoing, what, in your opinion, woul have been a fair and reasonable attorneys' fee in the aggregate fo the services performed by Mr. Mulvane's attorneys in his behalf i resisting the allowance and obtaining a dissolution of the temporar injunction?

A. I should say twenty thousand dollars.

Cross-examination.

Questions by Mr. SMITH:

Q. Your answer is based upon all the conditions and circum stances being true as stated in the question?

A. Yes, sir; on the hypothetical question which was submitte

Q. If it had been joint employment by Mr. Mulvane for himsel and other defendants, would twenty thousand dollars cover the en tire charge?

A. In my opinion, twenty thousand dollars would be a reasonabl fee for procuring the dissolution of the injunction under the circum stances named, whether it was for one or more parties.

Q. Would the element of time that counsel were required to giv to a motion of this kind have any effect upon the charge you name

A. It might have some effect. At the same time I don't think i ought to be considered very much in that matter. Now, if the cou sel here had worked on this case for a year, and Mr. Mulvane ha lost a year's interest on five hundred thousand dollars, amounting t from twenty-five to forty thousand dollars, perhaps the attorney services would not have been worth so much if they had worked year as if they had accomplished what they did in a few days an got Mr. Mulvane his money.

Q. Suppose they were required to go into court once on a motio to dissolve a restraining order in this town before Judge Foster, an appeared again on the motion to set aside a temporary injunctio and subsequently, within a week or ten days, they went to Litt Rock, Arkansas, and appeared before Judge Caldwell, and there su ceeded in prevailing upon Judge Caldwell to dissolve the injunctio all this occurring within three weeks, would you think twenty thou sand dollars would be a reasonable fee?

A. I think, with that addition to what is stated in the hypothetic question, that it would be a reasonable fee.

Q. What would you deem to be a reasonable fee, supposing the was only fifty thousand dollars involved, and that the only questio presented in court on which the order of dissolution was made wa

the fact that a necessary party defendant was a citizen *for* the same State as one of the complainants; and that fact appearing to the court, the court immediately dissolved the injunction on the
54 ground that the Federal court had no jurisdiction over the case? What, under those circumstances, would be a reasonable charge?

A. If the only thing involved, as your question starts out, were fifty thousand dollars, I don't think the attorneys' fees should be so much as I have already stated.

Q. Well, what do you think it should be under those circumstances?

A. And without any of the other circumstances mentioned in the first hypothetical question? Just taking your question alone?

Q. Yes, sir.

A. And by itself?

Q. Yes, sir.

A. I should think five thousand dollars was a reasonable attorneys' fee for the services and under the circumstances alone which you have mentioned.

Q. And that would be apportioned among the various defendants counsel appeared for?

A. No, I didn't say that. I think that would be a fair attorneys' fee for procuring a dissolution of an injunction involving that amount and solely under the circumstances which you mention.

Q. Would the fact of there being four or five different attorneys in this cause augment the total charge? Suppose that one counsel should appear—even under the hypothetical question put by Mr. Loomis—suppose one counsel should appear and accomplish the same result accomplished by these five or six gentlemen, would he be justified in making the same charge, the entire amount?

A. I think that each of the attorneys was entitled to a reasonable compensation. I think they were appropriate to be had under the circumstances. Where there is but one counsel there is danger of his becoming sick or loosing his energies in some way, or not thinking of something, or of the responsibility involving him weighing him down, where he has not divided the responsibility with other lawyers, whose opinion he respects, to help him. Then, more than one thinks of different things, and under such circumstances as these, more than one has more influence with most judges in expediting matters and hurrying them up than if there is just one man alone.

Q. You think the element of health cuts figure in the matter of counsel fees which an attorney should charge; that a robust man should charge larger fees than a weaker man should charge?

A. I think that four men on a large case are in the aggregate entitled to more compensation reasonably than if there was but one man.

Q. Well, when, in your view, should this aggregation of counsel cease? Should it keep on increasing larger, keep on increasing as the number of counsel multiplied? Suppose a man should employ twenty attorneys in this case, would these twenty attorneys be justi-

fied in charging an aggregate of twenty times what one counsel would charge or five times what four counsel should charge? Does that element cut any figure at all?

A. It cuts figure in this way, that I think it is a reasonable attorneys' compensation to have a reasonable number of attorneys in such a case as that, such a number as may be proper to have.

Q. Is it your experience as a member of the bar that causes sometimes suffer somewhat by a multitude of counsel?

A. Sometimes they do, when each one of the counsel leaves it to some other to do the thorough work in the case; that is sometimes the result.

Q. Is it not your experience at the bar that cases are better handled, most expeditiously attended to, and better results accomplished by, say, two counsel than where there is four or six or a greater number?

A. That depends upon circumstances. I don't know how a greater number than six could work to good advantage in a case, but I have known three or four to work to good advantage in different branches of the case.

55 Q. Is not that only where there is lots of testimony to take? But when there is only one proposition of law involved, where the question is submitted upon one single fact, is there any necessity in your view, in your experience at the bar, of employing half a dozen counsel?

A. I have often seen where one or two counsel would present a proposition which seemed to me to be very plain to the court; the third one would have a little different shade in which he presented it or a little different manner or with a little more tact. The court would at once fall in with his view and perhaps shut off all argument on either side.

Q. That would be owing to the fact that the first two counsel had not sufficient ability to present the matter properly to the court?

A. No; it might be because they didn't have the tact or didn't strike upon the accident of presenting it in the way which the court would see it.

Q. Then you think that a client should employ half a dozen counsel in a case for fear some one of the counsel should forget some one point; that while five counsel should forget five points six counsel would remember them all?

A. I didn't say that.

Witness excused.

E. S. QUINTON, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

Questions by Mr. LOOMIS:

Q. State your name to the jury.

A. E. S. Quinton.

Q. What is your business?
A. Lawyer.
Q. How long have you been practising law?
A. Twelve years here.
Q. In Topeka?
A. Yes, sir.
Q. Are you acquainted with Messrs. J. D. McFarland, Eugene Hagan, Hurd & Dunlap, and A. L. Williams, of this city?
A. I am.
Q. Are you acquainted with their professional standing as lawyers?
A. Yes, sir.
Q. Are you familiar with the practice in Federal courts?
A. Yes, sir.

56 Q. What in your opinion would be a reasonable attorney's fee for legal services rendered under the following state of facts: Upon December 14, 1889, Wescott & Hanson entered into an agreement with Joab Mulvane, whereby Mulvane was to convey to them all of the capital stock of the Topeka Water Supply Company for the sum of five hundred thousand dollars. Sixty thousand dollars of this amount was to be paid in cash upon the execution of a formal contract. Two days afterwards the parties met for the purpose of executing the formal contract. At that time Wescott & Hanson refused to make the sixty-thousand-dollars cash payment in accordance with the agreement of December 14th and Mr. Mulvane declared the contract off. He thereupon entered into a contract with Coffin & Stanton and Woodbury & Moulton to convey to them the capital stock of the Topeka Water Supply Company for the sum of five hundred and fifty thousand dollars. A fifty-thousand-dollars cash payment was made to Mr. Mulvane. The balance, amounting to five hundred thousand dollars, was to be paid, and the capital stock of the water company was to be delivered by Mr. Mulvane to the purchasers upon February 10, 1890. Five days before the contract between Coffin & Stanton and Joab Mulvane was to be consummated, to wit, upon February 5th, 1890, Wescott & Hanson brought suit against Mulvane and others in the circuit court of the United States for the district of Kansas for the purpose of specifically enforcing the agreement entered into between them and Mulvane, above referred to, and for the purpose of enjoining the execution of the contract entered into between Mulvane and Coffin & Stanton *et al.* A restraining order, without bond, was issued upon the filing of the suit, restraining Mulvane from carrying out his contract with Coffin & Stanton pending the hearing upon an application for a temporary injunction, which was set for February 12, 1890. At the time Mr. Mulvane entered into the contract with Coffin & Stanton *et al.* he (Mulvane) had secured, in addition to the stock owned by him, options on about thirty-four hundred shares of the capital stock of the water company at par, the par value of each share being one hundred dollars. These options would have enabled Mr. Mulvane to have secured the stock and carried out his contract with Coffin & Stanton if the execution of the contract had not been enjoined. When the temporary injunction was issued Mr. Mulvane found it

necessary to make absolute purchases of the shares of stock for which he had options, and to do so was compelled to incur obligations amounting to about three hundred thousand dollars, for which short-time notes were given. Mr. Mulvane's financial condition was such at the time the temporary injunction was granted that if it had been continued in force until the end of the litigation on the merits, or if if had not been dissolved within a short time after it had been granted, he would have been unable to meet his outstanding obligations and would have been bankrupted. To enable him to carry out his contract with Coffin & Stanton and others and to prevent his absolute bankruptcy, Mr. Mulvane employed Eugene Hagan, J. D. McFarland, and Hurd & Dunlap, lawyers of this city, for the sole purpose of preventing the allowance of the injunction and to obtain its dissolution if one should be granted. These lawyers made full preparations to oppose the issuance of a temporary injunction and did oppose it to the best of their ability. One of the grounds urged against an injunction was that Woodbury & Moulton, who were par-
57 ties to the contract enjoined, were necessary parties defendant; that one of them was a citizen of the same State as one of the complainants, and when made a party defendant the court would be ousted of its jurisdiction. Another point urged was that complainants had no contract with Mulvane which could be enforced, and therefore that they were not entitled to an injunction. After full argument and consideration, Judge Foster granted a temporary injunction (*injunction*) upon February 13th, 1890, and fixed the bond at seventy-five thousand dollars, which was given. Immediately thereafter motions were filed to dissolve the injunction and preparations made to call up the motions before Judge Caldwell, at Little Rock. An effort was also made by Mulvane's attorneys, before Judge Foster, to have Woodbury & Moulton, who were citizens of the same State as one of the complainants, brought into the case as parties defendant and thereby oust the court of its jurisdiction. Judge Foster, however, ruled against Mulvane on this point. After the temporary injunction was granted and before the effort was made to have Woodbury & Moulton made parties defendant, A. L. Williams, lawyer, of Topeka, was also employed by Mr. Mulvane for the purpose of assisting in procuring a dissolution of the temporary injunction. The motions to dissolve were fully argued before Judge Caldwell, at Little Rock, and the injunction dissolved upon the ground that Woodbury & Moulton were necessary parties defendant; that when they were brought into court jurisdiction of the case would be lost because one of them was a citizen of the same State as one of the complainants.

The complainants, Wescott & Hanson, were representing other parties in the negotiations with Mr. Mulvane for the purchase of the Topeka Water Company stock. They were not to invest a dollar of their own money in the deal, and when it came to carrying out the preliminary arrangement made upon December 14, 1889, by executing a more formal contract, the parties whom Wescott & Hanson represented refused to make the sixty thousand dollars payment in accordance with the terms of the agreement. There were other de-

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Mr. SMITH: The defendant objects to the question as in- competent, irrelevant, and immaterial, argumentative in form d containing misstatements of facts, misleading and contrary to e testimony already offered by the plaintiff in the case, and be- use the statement contained in it forms no correct basis to enable e witness to testify as to the value of the services rendered in the se in which suit was brought.

The court overruled the objection; to which ruling of the court e defendant at the time duly excepted.

A. I should think twenty-five thousand dollars would be a rea- nable fee.

Cross-examination.

Questions by Mr. SMITH:

Q. You raise it five thousand dollars over the other gentlemen, o you?

A. That is what I consider to be a reasonable fee.

Q. What is your judgment based on?

A. Based on the conditions and facts stated in that hypothetical uestion.

Q. If the conditions stated in that question did not exist, then our testimony would be different, would it?

A. Of course, if that wasn't the question or wasn't the case, I vouldn't make that answer.

Witness excused.

D. R. HITE, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

Questions by Mr. LOOMIS:

Q. Please state your name to the jury.
A. D. R. Hite.
Q. What is your business?
A. Lawyer.
Q. How long have you been practicing law?
A. I was admitted to the bar in 1891.
Q. Are you familiar with the practice in the Federal courts?
A. Yes, sir.
Q. Are you familiar with Messrs. J. D. McFarland, Hurd & Dunlap, Eugene Hagan, and A. L. Williams, of this city?
A. Yes, sir.
Q. And with their professional standing and ability as lawyers?
A. Yes, sir.
Q. Did you hear this question read? (This refers to the same question which was propounded to A. H. Horton on page 206 *et seq.* of this case-made.)
A. Yes, sir.
Q. You may answer it, then, without having it repeated to you.

Mr. SMITH: We offer the same objection to this question as before.

The court overruled the objection; to which ruling of the court the defendant at the time duly excepted.

A. I think the services would be worth from eighteen to twenty thousand dollars.

Cross-examination.

Questions by Mr. SMITH:

Q. That is, services rendered to the defendants in the case?
A. Yes, sir.
Q. Your testimony is based entirely upon conceding the truth of all those statements made in that question?
A. Entirely; yes, sir; I know nothing about the case at all.
Q. From your experience at the bar do you think a client's interest is protected better by the employment of quite a number of attorneys?
A. I think it is in a very big case; yes, sir.
Q. What do you mean by a big case—where there are numerous questions of fact and numerous questions of law involved?
A. No; where there is a large amount of money involved.
Q. Where a large amount of money is involved and only one question of fact and one question of law involved, do you think the employment of six lawyers is necessary?
A. If the question of fact or the question of law is a very simple

one, I should think there would be no necessity for employing very many lawyers.

Q. Conceding that that question of fact was simply this, whether a party was a necessary defendant to the cause, and it appearing that the party was a necessary party to the cause, to a case pending in the Federal court, and a necessary party defendant was a citizen of the same State as one complainant, that would be a very simple question of law, wouldn't it?

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A. Yes, sir.

Q. A simple question of fact?

A. Yes, sir.

Q. That being the only true issue involved, even conceding there was five hundred thousand dollars involved, do you think twenty thousand dollars fee is a reasonable fee on that question?

A. I don't think it would if the case had never been presented at all, but if that question had been presented to a court of competent jurisdiction and the ruling had been adverse and the time was growing very short, as I understand it did in this case, I should think the fee would be commensurate for getting that overruled.

Q. The fact that some judge arbitrarily overruled a co-ordinate judge upon a question of fact and question of law—do you think counsel would be justified in charging a larger fee?

A. Well, sir, I can only say to this question that I do not think either one of those judges are to be very lightly considered. I think Judge Caldwell and Judge Foster are men who do not do things like that, and, if I remember right, the question that is in this hypothetical question of diverse citizenship of parties—that up to and about the time of the trial of this case that was not a simple question of law; there was a good deal of dispute about that.

Q. It has always been a simple question of law to you that a Federal judge——

A. Yes, sir; but, then, the question here was where the complainants had to be brought in.

Q. But the legal proposition that the Federal court has no jurisdiction over cases between citizens of the same State is a simple proposition, isn't it, and always has been?

A. If the jurisdiction is claimed on the ground of diverse citizenship, that has always been very simple.

Q. And this case being a case where the Federal court was invoked solely on that ground, it is a very simple question?

A. It is to me; but, it has been since I have known anything about it that that question has been well settled.

Q. It has always been settled that Federal courts had jurisdiction over cases between citizens of the same State?

A. If that was the only thing, that has always been settled.

Q. The only question of dispute in this case would be whether Woodbury and Moulton were necessary parties defendant to this case?

A. Yes, sir; their being citizens of the same State as complainants.

Q. That would be the only fact involved in the case?

A. Yes, sir; as I understand it.

Q. Now, where that is the only fact involved in the case, do you think counsel is justified in charging twenty thousand dollars?

A. I think where that state of facts has been presented to a man like Judge Foster and he had ruled against the Mulvane interest in that respect—that under the circumstances presented by this hypothetical question, the sort of a box Mr. Mulvane was in, that it required a good deal of skill on the part of the attorneys and a good deal of nerve, you might say, to take that question before Judge Caldwell, because I have never understand a circuit judge could do or would do such things as that except in very plain cases.

Redirect examination.

Questions by Mr. Loomis:

Q. Whether or not persons are necessary parties is somewhat of a question, is it not, Mr. Hite?

A. Yes, sir; very much of a question.

Q. And from what is that point to be determined?

60 A. It is a mixed question of law and fact, I guess. It is to be determined largely from the pleadings, in the first place, as to whether there are other parties necessary to be brought in there to determine the issue, and also from evidence to be introduced.

Q. The first question would be to determine whether they were necessary parties?

A. Yes, sir.

Q. And then upon the assumption that they were necessary parties, what the legal effect would be upon the jurisdiction of the court?

A. Yes, sir.

Q. That would be another question?

A. Yes, sir.

Witness excused.

Eugene Hagan, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

Questions by Mr. Loomis:

Q. State your name to the court and jury.

A. Eugene Hagan.

Q. What is your business, Mr. Hagan?

A. Attorney-at-law.

Q. Where do you practice law?

A. Topeka.

Q. How long have you been engaged in the practice of law?

A. I think about nineteen years.

Q. Were you one of the attorneys employed for Mr. Mulvane to represent him in resisting the allowance and obtaining a dissolution

of the temporary injunction granted against him in the case of Wescott & Hanson against Mulvane and others, pending in the United States circuit court, district of Kansas?

A. I was.

Q. State whether or not you represented Mr. Mulvane for the purpose of getting rid of the injunction and preventing its allowance.

A. I was employed by Mr. Mulvane for that purpose. I was one of the attorneys for that purpose.

Q. Whom were you employed to represent?

A. Mr. Mulvane.

Q. State whether or not you were employed by any of the other defendants in the case.

A. No.

Q. Did you appear for any of them?

A. If I did it was a mere matter of form or incidental appearance, because I didn't know any of the rest and don't even now know who were the other defendants in the case.

Q. If your name did appear as attorney for any of the other defendants how would you account for it?

A. Well, it was some time that winter, in completing the motion that was filed, in order to get it before the court properly, some one of the attorneys, as a rule, signed the name and appeared there in that way.

Q. Was that for the purpose of more properly protecting Mr. Mulvane's interest?

A. That was exactly it.

Q. In securing the dissolution of the injunction?

A. Yes, sir.

Q. Did you make any charge against any of the other defendants in the case for services performed?

A. No, sir; none whatever.

Q. Do you ever expect to?

A. Never expect to and never in any case considered I was appearing or working for them.

Q. Who did you consider you were working for in the case?

A. Mr. Mulvane.

Q. And he alone?

A. Yes, sir.

Q. Did Mr. Mulvane pay you for your services in connection with that temporary injunction?

A. He did.

Q. How much did you charge and how did he pay you?

A. He paid me three thousand dollars.

Q. For your services in that case?

A. Yes, sir.

Q. Were you employed by him upon the merits of the case?

A. I was not.

Q. When the injunction was dissolved did you cease your connection with the case?

A. I did.

Q. Do you recall how many hearings were had before Judge
61 Foster before you went to Little Rock in the injunction proceeding?

A. I can only give it as I now recollect them. I think I was employed either the same day or the day after Messrs. Hurd & Dunlap were employed, which was probably within a day or two after the restraining order had been issued. I think it was the same day, probably, Hurd & Dunlap were employed. We began to prepare to resist the application for a temporary injunction, and we continued our work on that until the application was heard. If my recollection serves me correctly, I think we appeared after that temporary injunction was issued on a motion to dismiss on the ground that the court had no jurisdiction, and that was argued. We were defeated on that.

Q. Upon what grounds did you urge that the court had no jurisdiction?

A. I believe we put it on two grounds: first, that this kind of an action was not one—was not the proper kind of an action in which to—that the contract could not be specifically enforced. The second was that Woodbury & Moulton were necessary parties, and that they had a common citizenship with the complainant, and for that reason the court had no jurisdiction.

Q. Was that raised before Judge Foster, that jurisdictional question, on account of Woodbury & Moulton being necessary parties?

A. I can only depend on my recollection as it came up; that when the application for a temporary injunction was heard we didn't know that Woodbury & Moulton—Mr. Woodbury, I believe, or Woodbury & Moulton, I forget now which—had a residence in Maine, where one of the plaintiffs had a residence, and I don't believe we knew it, or at least it was very late before we discovered it. The attorneys didn't know that, and just one evening in consultation Mr. Mulvane casually remarked that he was up in Maine; that was the reason we couldn't see him, and then we discovered for the first time after we had been working on this case where Mr. Woodbury lived, and that he had a common citizenship with one of the complainants.

Q. Now, after you learned that fact was it called to the attention of Judge Foster?

A. Yes, sir, and it was argued, and in support of it affidavits were read.

Q. Read in the presence of counsel for Wescott & Hanson?

A. Yes, sir, and I think there is a little opinion in the case somewhere rendered by Judge Foster denying it.

Q. Did Wescott & Hanson jump in and dismiss the case?

A. No, sir.

Q. They still went ahead, did they?

A. Yes, sir.

Q. Mr. Hagan, was the only point urged in the case in the hearings for the purpose of obtaining a dissolution of the injunction that one that the court had no jurisdiction because of the citizenship of the parties; was that the only point urged upon these hearings?

A. No, sir; it was not.

Q. How many other points were urged?

A. Well, when we were first employed we went to work in the case together, and worked together, I think, every day, and probably every night, and the bill in equity, as far as we then knew, had jurisdiction, it disclosed full jurisdictional grounds, and the only relief we could see was that this was not such a contract that could be enforced at all, or if it could be enforced they had a remedy at law for damages, and we went to work on that line, because we were not aware there was a common citizenship, and we exhausted every means to have the court act upon that ground.

Q. Was it urged, Mr. Hagan, that Wescott & Hanson had no such contract, that they had no contract with Mr. Mulvane; was that urged?

A. That was one of the grounds urged upon the application for a temporary injunction, and it was very elaborately briefed and
62 examined by the lawyers before we took it up.

Q. Wasn't that the point upon which the case was finally decided by Judge Riner?

A. I don't remember about that.

Q. State whether or not in your opinion your services in connection with the temporary injunction were reasonably worth the amount you charged, three thousand dollars.

A. I do.

Q. What in your opinion, Mr. Hagan, would have been a reasonable charge in the way of attorneys' fees for the services performed in Mr. Mulvane's behalf in the aggregate in resisting the allowance and obtaining a dissolution of that temporary injunction?

A. I have heard—I know about the case as it was, and I would fix it at twenty thousand dollars, and I don't think it would be an unreasonable fee. I think it is very reasonable.

Q. You think it would have been a reasonable fee in the aggregate for the services rendered for Mr. Mulvane?

A. Yes, sir.

Q. In connection with that injunction?

A. Yes, sir.

Cross-examination.

Questions by Mr. SMITH:

Q. If you had been employed alone would you have felt justified in charging that?

A. Well, I possibly would not, though I should think it was worth it.

Q. What did he say to you when he came to retain you in the case?

A. He said he wanted to retain me. A. My recollection is that David Mulvane said his father wanted to retain me, and that was the first I ever knew there was such a case.

Q. At that time you knew Mr. Mulvane was president of the Topeka Water Supply Company?

A. I may have known it.

Q. And knew he was president of the new company?

A. I didn't know at the time there was any change.

Q. When you found the bill that was filed in court you then ascertained that he was president of the new company?

A. Yes, sir. I think that is the first time I ever knew there had been a new company organized.

Q. You appeared as counsel for the two water companies, didn't you?

A. If I did it was a mere matter of form, and I don't know that my name appears—it may—on the pleadings. I don't know whether it does or not.

Q. You would not file a pleading in a case you were not authorized to file?

A. I certainly would not.

Q. And therefore if your name appears as counsel for the water company, either one of them, you appeared with authority?

A. I appeared there with authority; yes, sir.

Q. You rendered services?

A. Yes, sir.

Q. And rendered common service to both companies, and Mr. Mulvane also?

A. Well, my understanding was at the time that I was there representing Mr. Mulvane. I didn't know anything about the water company, nor anybody else.

Q. Mr. Mulvane was president of the two companies, and you represented him by representing him as president of the two companies?

A. Personally I don't think it was ever contemplated by Mr. Mulvane or myself that I ever had anything to do with that.

Q. One of the first pleadings I turn to here is a motion to dissolve the injunction, wherein your name appears as counsel — Joab Mulvane, Topeka Water Supply Company, and Topeka Water Company. That is true all through the pleadings. You appeared and filed an answer, didn't you, to the merits, representing the water company?

A. Yes, sir; I think it was an answer.

Q. That was in pursuance of employment by Mr. Mulvane?

63 A. No, sir; I will state the circumstances under which that answer was filed; we were not appearing for the defense in that, but before we could have a motion to dissolve filed and it was heard the bill would be in default, and an answer had to be filed and we took it up. I think that is the reason for it.

Q. Aren't you mistaken on that? Don't you know this bill wasn't in default for sixty days after it was filed and motion to dissolve the injunction was immediately filed?

A. The motion wasn't heard for probably sixty days, and that is my recollection.

Q. Aren't you mistaken on that fact? Wasn't the motion heard within thirty days after?

A. The motion was heard probably sixty days after before Judge Caldwell; there wasn't any motion to dissolve that I know of filed in this court at all.

Q. The bill was filed on February 5, 1890. Temporary injunction was awarded on the 13th day of February.

A. Do you find any motion to dissolve in this court here?

Q. Yes, sir; on the 17th day of February didn't you appear for Woodbury & Moulton?

A. What is that appearance?

Q. 17th day of February. You appear to have signed a motion appearing for Woodbury & Moulton, yourself and McFarland, and Hurd & Dunlap.

A. Application to make parties to the suit?

Q. Yes.

A. What day was the motion here filed to dissolve? I don't recall it if there was a motion.

Q. Didn't you appear on the 3rd day of March for the Topeka Water Company? Here is an appearance: "And now comes the defendant, Topeka Water Company, by its solicitors, and enters its appearance in this suit to complainant's bill of complaint filed herein, and hereby enter our appearance as solicitors for said defendant, Topeka Water Company, herein. Dated the 3rd day of March, 1890. Williams & Dillon, Hurd & Dunlap, Eugene Hagan, J. D. McFarland;" and you also entered your appearance for the Topeka Water Supply Company.

A. Those appearances were to have all the parties in court so we could tell whatever rights Mr. Mulvane had.

Q. You rendered services to those people, did you not? Didn't you also sign the answer of the Topeka Water Supply Company, which was filed on the 3rd day of March?

A. If the record so disclosed it I did.

Q. Wherever you appeared as counsel for any of the parties you appeared in pursuance of this employment of Mr. Mulvane?

A. Yes, sir.

Q. At that time he was president of the Topeka Water Company and the Topeka Water Supply Company?

A. Yes, sir; as I stated, I wasn't appearing for him as president of the company; I was appearing for him as an individual.

Q. What right had you to go in and appear for the defendant company unless you was employed?

A. Right they assumed.

Q. You appeared and rendered services for the Topeka Water Company and Topeka Water Supply Company?

A. Yes, sir.

Q. You filed their answers, filed motion to dissolve, and made one common charge for all these services against Mulvane?

A. Yes, sir.

Redirect examination.

Questions by Mr. Loomis:

Q. When a bill is filed in equity, say, upon February 5th of a certain year, when would the answer be due in the ordinary course of business?

A. When the rule day comes.
Q. When would rule day come?
A. The first Monday, whatever it is, in the following month.
Q. That would have been the first Monday in March?
A. Yes, sir.
Q. And then pleadings or answer would have been due?
A. By the first rule day following.
64 Q. That would be the first Monday in April?
A. Yes, sir.

Q. Did you have any certainty when you could get up the motion to dissolve before Judge Caldwell?

A. No, sir; the fact is, when these matters were pending we had no circuit judge, as I recollect it, part of the time. Judge Caldwell was appointed judge just a few days before this matter was heard, and I think the office was vacant of circuit judge for something like two or three weeks, awaiting confirmation or something.

Q. It was very uncertain when you could get the matter before him?

A. Yes, sir; I desire to say that my recollection of the answer is that Mr. McFarland drew it, and it was filed either to be in court properly when the motion to dissolve should appear or to prevent default—to take care of the pleadings until we got rid of the injunction. That was all we had in contemplation.

Q. Didn't you think it was important in the protection of Mr. Mulvane's interests to see there was no default of any defendants in the case?

A. Certainly.
Q. You appeared for them in protection of Mulvane's interests?
A. Yes, sir.

Q. As a matter of fact, wasn't the temporary injunction dissolved by Judge Caldwell, at Little Rock, April 4th, nearly sixty days after the suit was brought?

A. If the record discloses it. I know it was probably about sixty days after suit was brought. He dissolved it the day we went down there and presented it.

(Witness excused.)

J. D. McFARLAND, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

Questions by Mr. LOOMIS:

Q. State your name to the court and jury.
A. James D. McFarland.
Q. What is your business?
A. Practicing law.
Q. How long have you been in that business?
A. Over twenty-five years.

Q. Were you one of the attorneys employed by Mr. Joab Mulvane to resist in his behalf the allowance of the temporary injunction o

Wescott & Hanson against Joab Mulvane and others, pending in the United States circuit court for the district of Kansas?

A. I was employed in the case by Mr. Mulvane; yes, sir; when the case was brought—about that time.

Q. Did you, in connection with other attorneys employed by Mr. Mulvane, assist in these injunction proceedings and assist in procuring a dissolution of that?

A. Yes, sir; and in resisting the injunction.

Q. That is, the allowance of the temporary injunction in the first place?

A. Yes, sir.

Q. In representing Mr. Mulvane's interest in the case, in connection with the injunction proceedings, did you also appear for other defendants in the case?

A. I appeared for Mr. Mulvane, the two water companies, and Coffin & Stanton, and also appeared in filing an application with other attorneys for Woodbury & Moulton.

Q. What charges did you make against Mr. Mulvane for the services rendered in his behalf in resisting the allowance of the temporary injunction and in procuring its dissolution?

A. Mr. Mulvane paid me four thousand dollars for my fees for my services in the injunction matters.

Q. Was that for services rendered in the injunction matters alone?

A. Yes, sir.

Q. Did that payment include anything done by you in the case after the temporary injunction was dissolved?

A. No, sir; the four thousand dollars was paid for services
65 in the injunction matters for all of the defendants I appeared for. That did not include the other services rendered by me in the case.

Q. Did you make any charge against any of the other defendants in the case?

A. I did not. My understanding was that Mr. Mulvane was to pay for all of those services.

Q. He was the one that actually did pay the money?

A. Yes, sir.

Q. I wish you would state whether or not in your opinion the amount you charged was a reasonable fee for the services performed by you for which the charge was made.

A. I think the four thousand dollars paid me was a reasonable fee for services in the case up until the time of the dissolution of the injunction.

Q. Services in connection with the injunction proceedings?

A. Yes, sir; and the services as rendered, I suppose, up until the time of the dissolution of the injunction by Judge Caldwell could properly all be said to have been rendered in the injunction proceedings, although there were some answers filed. I would say that including the services up until that time.

Q. In reference to those answers and appearances and other pleadings which were filed by you and your associates, state whether or not it was, in your judgment, proper or necessary to file those plead-

ings for the better protection of Mr Mulvane's interests in the matter of the injunction proceedings.

A. I would regard it important that they be filed when the proper time came to file them, and I should think that the answers—after the answers came in they would have a bearing upon the question of the injunction if that was still pending.

Q. As a matter of fact, did the filing of these pleadings have any bearing upon the ruling of Judge Caldwell in dissolving the temporary injunction?

A. What does Judge Caldwell's order say about it?

Q. I will show it to you. (Hands witness paper.)

A. He says, reading from the record, "And it further appearing that the court granting the temporary injunction postponed consideration and decision of this question until the coming in of pleadings and proof now before me upon that subject."

Q. Then you would say that the fact of the pleadings and proofs being in would have had any influence with Judge Caldwell in the decision which he made?

A. I don't know, but I suppose they had some bearing.

Cross-examination.

Questions by Mr. SMITH:

Q. Didn't you consider yourself capable of handling the case alone?

A. Oh, I——

Q. It was a particularly intricate case, was it?

A. It was a case that involved a great deal to Mr. Mulvane. I wouldn't like to say whether I could or that I would have felt unable or would not. I was called on for assistance.

Q. Do you think it is necessary to have five or six assistants in a case like that—outside of this case, as a general proposition?

A. As a general proposition?

Q. Yes.

A. As a general proposition I would say that generally it is not necessary to have five or six attorneys in a case.

Q. Nothing particularly intricate in this case? It was a question of fact or a question of law, wasn't it?

A. A lawsuit sometimes don't seem intricate after you get through and win it as it does while it is going on.

Q. The only question involved was as to the necessary parties, and if the court should have found that fact to exist, then you know and everybody else knows and as lawyers know that the Federal court has not jurisdiction between citizens of the same State?

A. That was not the only question in the case. When the
66 matter came up before Judge Foster there were other questions argued.

Q. If this fact exist and there is no other question in the case, the court would dismiss the case as soon as that fact became known?

A. My impression is that fact was brought out before Judge Foster in some proceedings before him that Woodbury & Moulton were

citizens of Maine, the same State as one of the complainants, and that he refused to let them in or to set aside, and in the face of that granted the injunction. I don't remember just when that fact was presented to him, but my recollection is that fact was before him and he decided against it.

Q. Do you govern your charges by the fact that there were numerous other counsel in the case or did you charge what you thought the case was worth? Did you think four thousand dollars was a fair charge for the services rendered?

A. Well, I think four thousand dollars was a *fair* charge for the services that I rendered.

Q. Don't you think you could have accomplished the same results if you had been alone?

A. I can't tell about that. Possibly I might; perhaps I might not.

Q. Is it not your best judgment you would have accomplished the same results?

A. That is a very hard question to answer. Looking at it now and knowing all about it I do know about it, it is possible that I might; still I don't know that I could.

Redirect examination.

Questions by Mr. LOOMIS:

Q. Did the case seem so easy when you were fighting it?

A. No; it did not.

Q. Did you make a pretty hard, stiff fight before Judge Foster to prevent the allowance of the injunction?

A. Yes, sir.

Q. Did you make an effort to get rid of the injunction by bringing in other parties and showing the court it had no jurisdiction?

A. After that we made the application before Judge Foster to let in Woodbury & Moulton.

Q. Did you make a pretty hard fight on that?

A. We filed our motion and affidavits in support of it and argued it.

Q. Argued as hard as you could?

A. As well as we could.

Q. Got paid for that?

A. Yes, sir.

Q. Wasn't that a pretty difficult matter, after a district judge sitting as circuit judge had ruled on that, to get it taken up by another circuit judge?

A. It would be regarded so.

Q. Didn't you so regard it at the time?

A. Yes, sir; my recollection is that I did.

(Witness excused.)

Mr. LOOMIS: We now offer in evidence the statement of A. L. Williams.

Said statement was read to the court and jury and is in words and figures as follows, to wit:

"In the District Court of Shawnee County, Kansas.

JOAB MULVANE, Plaintiff,
vs.
A. J. TULLOCK ET AL., Defendants.

Stipulation.

It is hereby agreed between the parties hereto that the following statement, signed by A. L. Williams, may be read and treated as his deposition in the above-entitled cause:

"I was employed by Mr. Joab Mulvane in the case of Wescott and Hanson *vs.* Joab Mulvane *et al.*, pending in the circuit court of the United States for the district of Kansas, to assist in procuring a dissolution of the temporary injunction against Mr. Mulvane in that case. In pursuance of that employment I, together with other attorneys, appeared for and represented Mr. Mulvane and succeeded in obtaining a dissolution of the injunction. For the services rendered by me to Mr. Mulvane in procuring the dissolution of the temporary injunction in that case, and for no other services, I charged Mr. Mulvane three thousand dollars, which amount he paid me. I also represented Mr. Mulvane upon the merits of the case, but charged a separate fee therefor, which had nothing to do with the services rendered in connection with the temporary injunction. In my opinion the fee charged by me in procuring a dissolution of the temporary injunction was a reasonable fee for the services performed. In my efforts to procure a dissolution of the injunction for Mr. Mulvane, I appeared for some of the other defendants in the case. This was done solely for the purpose of assisting in the case. This was done solely for the purpose of assisting in procuring a dissolution of the temporary injunction against Mr. Mulvane and was done in pursuance of my employment by him. I was not employed by any of the defendants in the case other than Mr. Mulvane; performed no services at their request; have never charged any of the other defendants in the case a fee for my services in that case and never expect to. I have been practicing law in Topeka for more than thirty years last past.

A. L. WILLIAMS."

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11318.

Transcript of Record.

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1892.

GEORGE P. WESCOTT and SAMUEL HANSON, Appellants,
vs.
JOAB MULVANE, Appellee.
No. 230.

Appeal from the circuit court of the United States for the district of Kansas.

Filed January 13, 1893.

69 In the Circuit Court of the United States, District of Kansas.

To the honorable the judges of said court:

1. George P. Wescott, a resident of Portland, in the State of Maine, and a citizen of said State of Maine, and Samuel Hanson, a resident of the State of Massachusetts, and a citizen of said State of Massachusetts, bring this, their bill, against Joab Mulvane, a resident of the city of Topeka, in the State of Kansas, and a citizen of said State of Kansas, The Topeka Water Supply Company, a corporation organized under and by virtue of the laws of the State of Kansas, and a citizen of said State of Kansas, The Topeka Water Company, a corporation organized and existing under and by virtue of the laws of the State of Kansas, and a citizen of said State of Kansas, William Edward Coffin, Walter Stanton, Charles Harvey Jackson and Charles Fawcett Street, parties engaged in business under the firm name and style of Coffin & Stanton, in the city and county of New York, in the State of New York, and citizens of said State of New York, and The Atlantic Trust Company, a corporation organized and existing under and by virtue of the laws of the State of New York, and a citizen of said State of New York, and humbly complaining, show unto the court:

2. That the amount in controversy herein exceeds the sum or value of two thousand dollars, exclusive of interest and costs.

3. Your orators, further complaining, respectfully represent that prior to the transactions hereinafter narrated, to wit: prior to the 12th day of November, 1889, the Topeka Water Supply Company was a corporation organized and existing under and by virtue of the laws of the State of Kansas, and exercising and enjoying certain liberties, privileges and franchises under and by virtue of its articles of incorporation, and under and by virtue of certain ordinances before that time duly passed and enacted by the mayor and council of the city of Topeka, Kansas. That said liberties, privileges and franchises consisted in a right to supply to the citizens of Topeka, Kansas, water for domestic and other uses, and to the city of Topeka water for fire protection, and in and about the carrying on of said business to enter upon the streets, avenues and alleys of said city of

Topeka, and lay thereunder mains and water pipes for the distribution of water throughout the corporate limits of said city.

70 4. That in addition to the distributive system aforesaid, which at the time hereinbefore referred to had been largely constructed over the greater portion of the streets, avenues and alleys of said city of Topeka, the said Topeka Water Supply Company had a large and valuable franchise, consisting of an extensive brick structure with engines and pumping machinery, and had built, constructed and secured a costly and valuable source of water supply by digging and walling large wells near to the banks of the Kansas river, within the corporate limits of Topeka. That said franchise was exceedingly valuable, and its operation had proven highly profitable to the said The Topeka Water Supply Company, and was continuing to be profitable, and promised a large increase of returns in the future, owing to the same being located in the large, growing and well-built city of Topeka.

5. That prior to the said 12th day of November, 1889, the said defendant, Joab Mulvane, was president of said The Topeka Water Supply Company, and owned a controlling interest or share in its capital stock. That the capital stock of said company at that time was divided into four thousand shares of one hundred dollars each.

6. Your orators further respectfully represent unto the court that on or about the 12th day of November, 1889, on the afternoon of said day, your orators met at the office of said defendant Joab Mulvane in the city of Topeka, Kansas, pursuant to an appointment made between the said Mulvane and said Hanson some three or four weeks prior to that time.

7. That your orators had come to the city of Topeka with the view of entering upon negotiations with the said Mulvane looking to the purchase of said The Topeka Water Supply Company, and to thereby become possessed of the real property and franchises of the said The Topeka Water Supply Company, subject only to a mortgage of one hundred and twenty thousand dollars which rested as an incumbrance upon the property at that time. That pursuant to such negotiations, your orators obtained from the said Mulvane his consent to make such examination of the franchises and water works as they desired to make.

8. That on the following day, to wit: on the 13th day of November, 1889, your orators arranged to meet Mr. Mulvane on the morning and examine the books of said corporation, and later to enter in negotiations for the purchase of said plant. Accordingly, your orators visited the pumping station on the bank of the Kansas river, and made an inspection of the entire system such as they deemed desirable to make to properly give them a complete understanding of the affairs of said corporation.

71 9. That on the following morning, to wit: on the 14th day of November, 1889, your orators again met said Mulvane and went with him to examine the books of the corporation at the office of the water company, and finding everything in satisfactory condition it was arranged by your orators to meet said defendant

Mulvane at the hotel after dinner with a view to coming to some agreement, if possible, upon the price to be paid for said property.

10. That about half past two o'clock, the said Mulvane came to the hotel, and thereupon, in the room occupied by your orators, negotiations were opened, at which time the said Mulvane expressed his willingness and ability to obtain by purchase the balance of the capital stock of said corporation, and to sell the entire property to your orators for the sum of five hundred thousand dollars. This sum your orators had deemed too large, and had previously offered him, the said Mulvane, four hundred and fifty thousand dollars. Finally, said sum was raised to four hundred and seventy-five thousand dollars, which was declined by the said Mulvane, and it was agreed that your orators were to meet Mulvane at five o'clock in the afternoon and would then determine if they should pay the sum asked by him, namely: five hundred thousand dollars, or not. At five o'clock p. m., your orators met at said Mulvane's office by appointment, and went into the private room attached to the bank adjacent his office, and there agreed to pay him the sum asked, namely: five hundred thousand dollars.

11. That no definite contract was then made between the said Mulvane and your orators for the reason that said Mulvane represented that he could not yet sign a definite contract, as he had not yet completed, and could not for some time, his arrangements to transfer the stock not owned by himself, but that he would take the matter under consideration and obtain the consent of his associate stockholders, and within ten days would send a memorandum of contract then prepared duly signed, and that your orators might then send theirs duly signed, or he would declare the trade off.

12. That at the expiration of said ten days, namely: on the 22nd day of November, 1889, he addressed to your orator George P. Wescott, the following letter:

"DEAR SIR: I cannot write you anything definite today; will write you again, or may see you, as I expect to be in Boston in the near future, and will advise you when I will go East soon as my broken arm will allow.

Respectfully yours, JOAB MULVANE."

72 13. That your orator replied at once that they should be pleased to meet him, the said Mulvane, in Boston, any day he might name, and your orator George P. Wescott gave to the said Mulvane his address as the Parker house, Boston.

14. On December 4th, the said Joab Mulvane wrote to your orator, George P. Wescott, as follows:

"DEAR SIR: I expect to be in Boston on the 14th inst., and will call at the Parker house, and shall be pleased to meet you.

Please accept my thanks for your courtesy for sending the form for accounts.

I shall be able to talk and act definitely with you as to the business matter heretofore discussed.

May I congratulate you on the triumph of your Mr. Reed for Speaker.

My right arm is yet in limbo, and writing is a difficult task.

Respectfully yours, JOAB MULVANE."

15. On December 13th, your orator, George P. Wescott, received the following telegram dated in Boston:

"Will be at the Parker house today and tomorrow.

(Signed) JOAB MULVANE."

16. Your orator, George P. Wescott, replied that he would meet him, the said Mulvane, in Boston on Saturday at eleven o'clock a. m., and accordingly at eleven o'clock a. m. he was at the Parker house and was there until 12.45 waiting for the said Mulvane to keep his appointment. At that time he came in and explained his delay, and thereupon, the said Mulvane and your orators, Hanson and Wescott, retired to room No. 304 on the second floor of the Parker house, where the said Mulvane stated that he now owned, in his own right, three hundred and eighty-eight thousand dollars of the capital stock of the Topeka Water Supply Company, leaving but twelve thousand dollars of the stock to be acquired, which he expected to have in a very few days, so that then he was in a position to sell and deliver the entire stock, except said twelve thousand dollars. That he had actually purchased the stock in his own name and now owned the same, but that it had cost him more money than he had expected, and he could not sell the stock at the price he had named, and that he should require at least fifty thousand dollars more than the price then named. That thereupon, considerable talk ensued, your orators insisting that while the said Mulvane had a perfect right to declare the transaction off, yet your orators understood it to be the agreement that if he could acquire the stock and it was possible to carry out the transaction, that it would be done at the price named in the agreement of November 13th, and inasmuch as he had carried it out and could accomplish it, your orators certainly felt that the sum which had been offered him at Topeka should be accepted by him and the stock delivered to them. That he had been acting as your orators' agent in acquiring the stock, and that it should be delivered to them.

73

17. Thereupon, after considerable negotiation, the said Mulvane intimated that twenty-five thousand dollars additional, or five hundred and twenty-five thousand dollars, was the very lowest sum at which he would sell the property, and would require fifty thousand dollars paid on account at the time of signing contract. That after further conserration, your orators retired from the room for a conference to see whether they should pay the twenty-five thousand dollars extra or not. Returning to the room, your orators informed Mulvane that five hundred thousand dollars was their best offer, and must be accepted upon that day. He absolutely declined to sell at any sum less than five hundred and twenty-five thousand dollars, and declared that all negotiations were off, but before leaving the room, the said Mulvane intimated that he would accept said propo-

sition, provided they would pay him the sum of sixty thousand dollars as a first cash payment for said stock, instead of fifty thousand dollars, as at first agreed upon.

18. That thereupon, after considerable negotiation and discussion, the following proposition and form of acceptance were drawn up, and the proposition was thereupon duly signed by the said Mulvane, and the acceptance was duly signed by your orators:

"BOSTON, *Dec. 14th*, 1889.

GENTLEMEN: I will sell you the entire capital stock of the Topeka Water Supply Company, of Topeka, Kansas, which consists of 4,000 shares of par value of $100 per share, for the sum of five hundred thousand dollars ($500,000), on the following terms of payment, viz: The sum of sixty thousand dollars ($60,000), to be paid in cash on the signing of a contract to be made and entered into as of this date, the consideration named in said contract to be four hundred and forty thousand dollars ($440,000), to be paid as follows, viz: The sum of two hundred thousand dollars ($200,000) to be paid February 10th, 1890, one hundred and forty thousand dollars ($140,000) to be paid February 20th, 1890, and one hundred thousand dollars ($100,000) to be paid March 20th, 1890, provided, that final payment of the last-named sum of one hundred thousand dollars may
74 be paid on February 20th, if said Wescott and Hanson may elect so to do, by giving me five days' notice of such intention.

Payments to be made for and delivery of said stock to be made at the National Bank of North America, in the city of Boston, Mass.

(Signed) JOAB MULVANE."

To Geo. P. Wescott, Samuel Hanson.

"We hereby accept your offer to sell the entire capital stock of the Topeka Water Supply Company for the price and on the terms and conditions above stated.

(Signed) GEO. P. WESCOTT.
SAMUEL HANSON."

19. That it was the understanding of the parties at the execution of this contract that the more formal instrument mentioned in the proposition of Mulvane should be prepared for the signature of the parties on the following Monday morning.

20. Accordingly, your orators aver the fact to be, that on Monday morning, following, such contract was prepared and submitted to said Mulvane for any changes or suggestions that he might make with reference to it, not at variance with the terms of the agreement already entered into by the parties. That no valid or substantial objection was made to its terms, but the said Mulvane took said contract into his possession and put it in his pocket, and thereupon, after vain and repeated efforts upon the part of your orators to induce him to carry out the terms of said agreement by signing said formal contract and by carrying its provisions into effect, he announced that he was satisfied that your orators could not raise the

money and consequently he had determined to declare the whole matter off.

21. Your orators allege that they had made ample and abundant arrangement for the raising of the sum of money, and all sums required to be paid under said contract, and stood ready, and stand ready now, to carry out, to the minutest degree, the requirements of said contract and agreement. That they had a certificate of deposit from the Maverick National Bank of Boston, a copy of which is as follows:

75 "Capital, $400,000; surplus, $600,000.

Maverick national bank.

BOSTON, *December 17th*, 1889.

This is to certify that on the fourteenth day of December, 1889, through arrangements made with Samuel Hanson, I held for his account and on account of Geo. P. Wescott the sum of sixty thousand dollars ($60,000), to be paid to their order on demand.

J. W. WORK, *Cashier*."

Which said sum of money your orators stood ready to transfer at the National Bank of North America in the city of Boston, and which they stand ready to transfer now, and herewith tender to the said Joab Mulvane.

22. That the said defendant, Mulvane, kept the original form of agreement made in pursuance of the contract hereinbefore set out of the 14th day of December, and would not return it to your orators, but promised to do so as soon as he should have made a copy thereof. That he afterwards returned them what he asserted to be a typewritten copy.

23. That thereupon your orators prepared another form of agreement in strict conformity to the contract of December 14th, hereinbefore referred to, and duly executed the same by appending their signatures, and duly, through their solicitors, tendered the same to the said defendant, Mulvane, to be by him executed before the filing of this bill; and thereupon the said Mulvane refused to execute said formal agreement in compliance with the terms of the said contract, and refused in any way to perform said contract, and your orators hereby tender to the said Mulvane said contract to be executed.

24. That your orators are informed and believe that the said Mulvane sometimes pretends that he refused to perform said contract upon his part, or to go on further in the execution of his obligations in that behalf, because your orators are not able financially to carry out the terms of their said agreement; but your orators charge the fact to be that they and those whom they had associated with them in this agreement—and whom they had associated with them before entering into said agreement—are amply able financially to carry out said agreement, and to pay all of said sums of money promptly according to the terms thereof, and they are willing now to perform said agreement on their part, and herewith tender performance

thereof in accordance with the strict terms of said agreement, and demand performance upon the part of said Mulvane.

76 25. And your orators allege the fact to be, as against said pretense, that the said Mulvane has refused to perform said agreement because he had determined in his own mind to enter into certain negotiations and arrangements looking to the formation of another corporation, to wit: The Topeka Water Company, herein impleaded as a defendant, having at the time practical ownership of all of said property so as aforesaid sold and agreed to be conveyed to your orators, therein and thereby capitalizing said plant, franchises, and property at a sum largely in excess of that agreed to be paid by your orators, and thereby making a large profit unto himself over and above that which he would receive from your orators, to wit: the sum of two hundred and fifty or three hundred thousand dollars, and this after your orators' rights has accrued, to have said property duly conveyed to them under and by virtue of the terms of the contract aforesaid; and having in mind such arrangement, he alleged and pretended as an excuse therefor a belief—which your orators allege he did not entertain—that your orators were unable to carry out their agreement. But in any event such pretense upon the part of said Mulvane, your orators allege to be false and without foundation.

26. Your orators aver that in pursuance of the unconscionable and unlawful purpose hereinbefore referred to, and with the view of defeating your orators' rights, and with the view of preventing the enforcement of their contract according to its terms, the said Mulvane immediately returned to the city of Topeka and began the formation of the Topeka Water Company, and on the 28th day of December, 1889, he caused to be filed in the office of the secretary of state of the State of Kansas the charter of said The Topeka Water Company, the object and purpose of which was to construct, maintain and operate water works in the city of Topeka and the county of Shawnee, and at any and all other place or places in the State of Kansas; to buy, lease and operate water works in the city of Topeka and county of Shawnee, and at any and all other place or places in the State of Kansas, and to supply water for all public and private purposes in the city of Topeka and county of Shawnee, and at all other place or places. That the capital stock of said new corporation was fixed at one million five hundred thousand dollars, divided into fifteen thousand shares of one hundred dollars each.

27. That thereupon the said Mulvane applied to the mayor and council of the city of Topeka to pass a certain ordinance regranting the franchises, together with other franchises and privileges not mentioned in the first ordinance that had been previously granted

77 to the Topeka Water Supply Company, to the Topeka Water Company, and that, subsequently, and — pursuance of his, the said Mulvane's, request, an ordinance was passed; and thereupon, as your orators are informed and believe, without any grant authorizing them, the said The Topeka Water Company went into possession of the property and franchises of the said The Topeka Water

Supply Company, and is now operating said water works, plant and property, and collecting the tolls, incomes, rents and profits thereof.

28. That your orators are informed and believe, and therefore charge the fact to be, that the said Joab Mulvane and the said The Topeka Water Company are about to and are now engaged in attempting to negotiate bonds upon said water-works property and franchises, to the amount of one million five hundred thousand dollars, said bonds to be issued upon certification, after being duly executed, of the Atlantic Trust Company of New York, and that they are about to execute and place upon record a mortgage upon said property to the amount of one million five hundred thousand dollars, being the same property purchased by your orators under and by virtue of the agreement of December 14, 1889; that they are about to cause to be certified seven hundred and fifty thousand dollars of said bonds, and to place into the treasury of said The Topeka Water Company seven hundred and fifty thousand dollars of said bonds, to be employed in future extensions of said property.

29. And your orators allege, upon information and belief, that the said Mulvane and the said The Topeka Water Company have entered into negotiations with the said defendant, Coffin & Stanton, of New York, who are negotiators of and dealers in municipal securities in New York, to negotiate and sell the bonds aforesaid; and that the said Coffin & Stanton, in pursuance of said arrangement, have issued a certain circular, in substance setting out that said bonds are to be dated in 1890 and due in 1920, upon a trust deed, to be executed to the Atlantic Trust Company of New York, trustee; that the capital stock of said corporation, of which bonds are to be issued, is one million five hundred thousand dollars; that its authorized issue of bonds is one million five hundred thousand dollars; that seven hundred and fifty thousand dollars of said bonds are to be held by said trustee, to be issued upon future extensions, and one hundred and twenty thousand dollars held to retire the bonds of the Topeka Water Supply Company, and that six hundred and thirty thousand dollars of said bonds are to be offered upon the market for sale.

78 30. It is also stated in said circular that said company has a cash balance in its treasury of over fifty thousand dollars, and that the value of said works is eight hundred and fifty thousand dollars. That the present population included in the city limits of Topeka is estimated to be forty-five thousand. That the gross income of said works, as shown by experience, is seventy thousand, five hundred and ninety-five dollars and fifty-six cents per annum; operating expenses, eleven thousand, one hundred and ten dollars and eighty cents; net revenue, fifty-nine thousand, eight hundred and forty-eight dollars and seventy-six cents; interest charges on bonds proposed to be issued, forty-five thousand dollars; surplus revenues, fourteen thousand, eight hundred and forty-eight dollars and seventy-six cents.

31. That your orators are informed and believe, and therefore charge the fact to be, that the said The Topeka Water Supply Company is about to execute a deed of conveyance of its property and franchises to the said The Topeka Water Company, and that the

said The Topeka Water Company is about to execute a mortgage, or deed of trust, to the said The Atlantic Trust Company, and the said Joab Mulvane, as president of both of said companies, is about to execute and deliver the negotiable paper provided for in said mortgage, or deed of trust, and to sell the same to innocent purchasers, and thereby to incumber the property so as aforesaid contracted to be sold and delivered to your orators under and by virtue of the contract of December 14, 1889, and will certainly do the things aforesaid unless prevented and restrained therefrom by order of this court.

32. That the said The Atlantic Trust Company, acting upon behest of said The Topeka Water Company, is about to certify and issue said bonds, and said Coffin & Stanton are about to negotiate and place said bonds upon the market, and will do so unless restrained therefrom by order of this court, all of which actings and doings are against equity and good conscience, and are in manifest wrong of your orators, and will work upon your orators irreparable harm and injury.

33. That your orators are informed and believe, and so charge the fact to be, that if the stock of the Topeka Water Company has been certified, and any of said stock is in the hands of persons, incorporators and forming and acting as directors, or other persons than directors, of the said The Topeka Water Company, that all of said persons hold said stock at the request, and for the benefit and to the use of the said Joab Mulvane, or parties in interest with him; or, if otherwise, that they have not paid valid consideration for said stock and are not *bona fide* purchasers thereof.

79 34. That these persons, whomsoever they be, are unknown to your orators, but your orators pray that they may be made parties to this bill, and their rights subjected and decreed to be inferior and subordinate to the claims of your orators in this behalf.

35. Forasmuch, therefore, as your orators are without remedy at the common law, but can only have adequate relief in a court of equity, wherein matters like the foregoing are properly cognizable and relievable, your orators pray that a receiver may be appointed of said water works, plant and franchises, who shall take the same into his possession and hold, manage and operate the same, and collect the rents, issues and profits thereof under the direction of this court, and hold said rents, issues and profits to abide the further order and direction of the court.

36. That the said Joab Mulvane, the Topeka Water Supply Company and the said The Topeka Water Company be enjoined and restrained, pending this suit, from carrying out the schemes and purposes aforesaid; from putting upon record any deed of conveyance or mortgage; from signing, sealing and negotiating any such bonds as are described in the circular of said Coffin & Stanton, or in anywise incumbering, conveying or otherwise disposing of the title to said water works and franchises, or any part thereof.

37. That the said Coffin & Stanton be enjoined from negotiating any of the bonds aforesaid, and that the said Joab Mulvane, as president of said water companies, and said water com-

panies, and the said Joab Mulvane individually, be enjoined and restrained from further carrying out said negotiations or delivering said bonds, or executing said bonds, or putting said bonds upon the market, or from requesting said trustees to certify the same, or from requesting said trustees to act in any manner in connection with said scheme or enterprise looking to the formation of the Topeka Water Company, and its requirements of said franchises, or from distributing or selling any of said stock of the said The Topeka Water Company, or from ordering or directing said Coffin & Stanton to carry on its said negotiations; and that all of said parties be enjoined and restrained from offering said stock or securities upon the market, or selling or disposing of any stock or securities of the said The Topeka Water Company, or of the Topeka Water Supply Company, or from canceling any of the stock of the said The Topeka Water Supply Company, or from turning over the books of the said The Topeka Water Supply Company, or
80 from anywise impairing, affecting or terminating the active existence of the said The Topeka Water Supply Company as the owner and operator of the franchises as aforesaid.

38. And your orators further pray that said contract of December 14, 1889, may be specifically performed. That the said Joab Mulvane be ordered and directed to deliver up to the National Bank of North America the stock sold by him on said 14th day of December, 1889, to your orators, assigned by him in blank, and that upon payment being made as provided in said contract, and upon the terms and in conformity to the decree to be entered in that behalf, your orators shall be entitled to receive and own said stock, and to enjoy all the rights and privileges of ownership of said stock, to wit, ownership of the property and franchises of the said The Topeka Water Supply Company in its entirety, as the same stood and existed at the date of entering into said contract aforesaid.

39. But your orators pray that in the event that said Joab Mulvane has, by his actings and doings aforesaid, and by intermediate rights accrued and invested, prevented himself from the due performance of said contract, that all of the rights, privileges and benefits held and derived by said Mulvane from and under said contract aforesaid in dealing with the property so as aforesaid sold to your orators, and of all other claiming by, through or under him, shall be held to be trustees of your orators for and on account of any rights, benefits or property thereby received and growing out of said transaction.

40. Your orators further pray that said receiver hereinbefore prayed for, may be ordered and directed to take into his possession the said water-works pumping station, wells, tools, plant of every description, water mains and franchises, moneys, books, accounts and everything appurtenant or belonging to said water works, and to hold and operate the same in conformity to the duties and obligations of the said The Topeka Water Supply Company under and by virtue of its charter and the ordinances of the city of Topeka in that behalf enacted, and to collect the tolls, revenue, incomes and profits of all said property and hold the same as aforesaid.

41. And your orators further pray that upon a final hearing of the matters and things hereinbefore set out, that your orators may decree upon payment as aforesaid—which is herewith tendered—to be the owners of the entire capital stock of the said The Topeka Water Supply Company, and that the said The Topeka Water Supply Company has no right, claim or incumbrance upon said property or franchises of the said The Topeka Water Supply Company in
81 contravention of or against the rights of your orators, as aforesaid, and that the injunction hereinbefore prayed for may be made perpetual.

42. And if it shall be found that the said The Topeka Water Supply Company has prior to the commencement of this suit, made due conveyance of its rights and franchises to the said The Topeka Water Company, then your orators pray that the said The Topeka Water Company may be held to be the trustee of your orators for and on account of all things whatsoever so as aforesaid received by said conveyance, and that your orators be the holders of the capital stock of the said The Topeka Water Company, and for such other and further relief as may be conformable to equity and good conscience, and to this honorable court shall seem meet.

43. And may it please your honors to grant unto your orators the most gracious writ of subpœna, issued out of this honorable court and directed to the marshal, to be served upon the said Joab Mulvane, personally, and upon the said The Topeka Water Supply Company and the said The Topeka Water Company. And as the said Coffin & Stanton and the said Atlantic Trust Company are non-residents of this district, but live in the city and State of New York, your orators pray that an order be made directing service of a chancery subpœna upon them at their places of residence, and upon the party in possession of said property, commanding said defendants, and each of them, at a certain day and under a certain pain, to be and appear before this honorable court, and then and there true, direct and perfect answer to make to all and singular the premises (but not under oath, answer under oath being hereby expressly waived) and further to stand to, abide and perform such other and further order and direction as may be conformable to equity and good conscience and to this honorable court shall seem meet.

And your orators will ever pray.

ROSSINGTON, SMITH & DALLAS,
Complainant's Solicitors.

W. H. ROSSINGTON, *Of Counsel.*

UNITED STATES OF AMERICA, } ss:
District of Kansas, }

Charles B. Smith, being first duly sworn, on oath says that he is of counsel for the above complainants; that he has read the foregoing bill of complaint, and knows the contents thereof, and
82 that the statements therein contained are true, except such statements as are made upon information and belief, and as to all such, he believes them to be true.

And further, affiant saith not.

CHAS. B. SMITH.

Subscribed and sworn to before me this 5th day of February, 1890.

[SEAL.] CLIFFORD HISTED,
Notary Public.

Com. expires Feb. 15, 1893.

Indorsed: No. 6448. U. S. circuit court. George P. Wescott *et al. vs.* Joab Mulvane *et al.* Bill. Filed Feb. 5, 1890. Geo. F. Sharitt, clerk. Rossington, Smith & Dallas, sol'rs for compl't, Topeka, Kansas.

In the Circuit Court of the United States, District of Kansas.

GEORGE P. WESCOTT and SAMUEL HANSON, Complainants,
vs.
JOAB MULVANE, THE TOPEKA WATER SUPPLY COMPANY, THE Topeka Water Company, William Edward Coffin, Walter Stanton, Charles Harvey Jackson, and Charles Fawcett Street, Partners as Coffin & Stanton, and The Atlantic Trust Company, Defendants.

And now come said complainants, by Rossington, Smith & Dallas, their solicitors, and present to the court their bill of complaint, duly verified, and make application to the court for a temporary injunction, and it appearing to the court that no notice of such application has been made by said complainants—

It is, thereupon, ordered and directed that said application be set down for hearing on the 12th day of February, 1890, at 10 a. m., at the court-room, Topeka, Kas., and that said defendants be notified of said application by service of this order.

And it is further by the court ordered that in the meantime the said defendants, and each of them, their agents, attorneys, servants and employés, and all persons acting for or under said defendants, or either of them, be restrained from carrying out the schemes and purposes in said bill alleged.

That the said Joab Mulvane, The Topeka Water Supply Company and the said The Topeka Water Company be enjoined and restrained from putting upon record any deed of conveyance or mortgage; from signing, sealing or negotiating any such bonds
83 as are described in the circular of said Coffin & Stanton, in said bill of complaint set forth, or from in anywise incumbering, conveying or otherwise disposing of the title to said water works, and franchises or any part thereof.

That the said Coffin & Stanton be enjoined and restrained from negotiating any of the bonds aforesaid, and that the said Joab Mulvane, as president of said water companies, and said water companies, and the said Joab Mulvane, individually, be enjoined and restrained from further carrying out said negotiations, or delivering said bonds, or executing said bonds, or putting said *said* bonds upon the market, or from requesting said trustee to certify the same, or from requesting said trustee to act in any manner in connection with said scheme or enterprise, looking to the formation of the Topeka

Water Company, and its acquirement of said franchises or from distributing or selling any of said stock of the said The Topeka Water Company, or from ordering or directing said Coffin & Stanton to carry on said negotiations, and that all of said parties be enjoined and restrained from offering said stock or securities upon the market, or selling or disposing of any stock or securities of the said The Topeka Water Company or of the Topeka Water Supply Company, or from canceling any of the stock of the said The Topeka Water Supply Company, or from turning over the books of the said The Topeka Water Supply Company, or otherwise impairing, affecting or terminating the active existence of the said The Topeka Water Supply Company as the owner and operator of the franchises, aforesaid.

C. G. FOSTER, *Judge*.

Indorsed: No. 6448. U. S. circuit court. George P. Wescott *et al. vs.* Joab Mulvane *et al.* Restraining order. Filed *Feb. 5*, 1890. Geo. F. Sharitt, clerk. Rossington, Smith & Dallas, *compl'ts' sol'rs*, Topeka, Kansas.

Chancery Subpœna.

UNITED STATES OF AMERICA, } ss.:
District of Kansas, }

The United States of America to Joab Mulvane, the Topeka Water Supply Company, the Topeka Water Company, William Edward Coffin, Walter Stanton, Charles Harvey Jackson, and Charles Fawcette Street, partners as Coffin & Stanton, and the Atlantic Trust Company, Greeting:

We command you and every of you, that you appear before our judge of our circuit court of the United States of America for
84 the district of Kansas, at the city of Topeka, in said district, on the first Monday in the month of March next, to answer the bill of complaint of George P. Wescott and Samuel Hanson, this day filed in the clerk's office of said court, in said city of Topeka, then and there to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default.

To the marshal of the district of Kansas to execute.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, at the city of To-
[SEAL.] peka, in said district, this fifth day of February, in the year of our Lord one thousand eight hundred and ninety.

GEO. F. SHARITT, *Clerk*.

MEMORANDUM.—The above-named defendants are notified that unless they enter their appearance in the clerk's office of said court, at the city of Topeka aforesaid, on or before the day to which the above writ is returnable, the complaint will be taken against them as confessed, and a decree entered accordingly.

GEO. F. SHARITT, *Clerk*.

No. 6448. Circuit court United States, district of Kansas. George P. Wescott and Samuel Hanson *vs.* Joab Mulvane *et al.* Chancery subpœna. Returnable to rule day, first Monday in March, A. D. 1890. Geo. F. Sharitt, clerk. —— ——, deputy clerk. Filed Feb'y 5th, A. D. 1890. Geo. F. Sharitt, clerk. —— ——, deputy clerk. Rossington, Smith & Dallas, comp'ts' sol's.

U. S. Marshal's Return.

DISTRICT OF KANSAS, *ss:*

Received the within writ Feb'y the 5, 1890, and executed the same as follows, to wit: Served on the within-named defendant, Joab Mulvane, at Shawnee Co., State & district of Kansas, Feb'y 5th, 1890, by delivering to him personally a true & certified copy of this writ, with all indorsements thereon, and served same on the Topeka Water Supply Co. at said county, State and district Feb. 5th, 1890, by delivering a true and certified copy of this writ, with indorsements thereon, personally to Joab Mulvane, said Joab Mulvane being then and there the president of said defendant, The Topeka Water Supply Co., and served same on within-named The Topeka Water Company at county, State and district aforesaid, Feb. 5th, 1890, by delivering personally to Joab Mulvane a true and certified
85 copy of this writ, with all indorsements thereon, said Joab Mulvane being then and there president of said defendant, The Topeka Water Company, and after diligent search have been unable to find the other within-named defendants in my district or any place of residence of said defendants.

R. L. WALKER,
U. S. Marshal.
By L. D. DE BOST, *Deputy.*

Service $6.00.

In the Circuit Court of the United States, District of Kansas.

GEORGE P. WESCOTT and SAMUEL HANSON, Complainants,
vs.
JOAB MULVANE, THE TOPEKA WATER SUPPLY COMPANY, THE Topeka Water Company, William Edward Coffin, Walter Stanton, Charles Harvey Jackson, and Charles Fawcett Street, Partners as Coffin & Stanton, and The Atlantic Trust Company, Defendants.

And now come said complainants, by Rossington, Smith & Dallas, their solicitors, and present to the court their bill of complaint, duly verified, and make application to the court for a temporary injunction, and it appearing to the court that no notice of such application has been made by said complainants,

It is, thereupon, ordered and directed that said application be set down for hearing on the 12th day of February, 1890, at 10 a. m., at the court-room, Topeka, Kansas, and that said defendants be notified of said application by service of this order.

And it is further by the court ordered that in the meantime the said defendants, and each of them, their agents, attorneys, servants and employés, and all persons acting for or under said defendants, or either of them, be restrained from carrying out the schemes and purposes in said bill alleged.

That the said Joab Mulvane, the Topeka Water Supply Company and the said The Topeka Water Company be enjoined and restrained from putting upon record any deed of conveyance or mortgage; from signing, sealing or negotiating any such bonds as are described in the circular of said Coffin & Stanton, in said bill of complaint set forth, or from in anywise incumbering, conveying or otherwise disposing of the title to said water works and franchises, or any part thereof.

86 That the said Coffin & Stanton be enjoined and restrained from negotiating any of the bonds aforesaid, and that the said Joab Mulvane, as president of said water companies, and said water companies, and the said Joab Mulvane, individually, be enjoined and restrained from further carrying out said negotiations, or delivering said bonds, or executing said bonds, or putting said *said* bonds upon the market, or from requesting said trustee to certify the same, or from requesting said trustee to act in any manner in connection with said scheme or enterprise, looking to the formation of the Topeka Water Company, and its acquirement of said franchises or from distributing or selling any of said stock of the said The Topeka Water Company, or from ordering or directing said Coffin & Stanton to carry on said negotiations, and that all of said parties be enjoined and restrained from offering said stock or securities upon the market, or selling or disposing of any stock or securities of the said The Topeka Water Company, or of the Topeka Water Supply Company, or from canceling any of the stock of the said The Topeka Water Supply Company, or from turning over the books of the said The Topeka Water Supply Company, or anywise impairing, affecting or terminating the active existence of the said The Topeka Water Supply Company as the owner and operator of the franchises aforesaid.

C. G. FOSTER, *Judge*.

Indorsed: No. 6448. Restraining order. Filed Feb. 5, 1890. Geo. F. Sharitt, clerk.

Received this order February 5th, 1890, and served same on the within-named defendant, Joab Mulvane, at Shawnee Co., State and dist. of Kansas, at 3.00 p. m., by delivering to him personally a true and certified copy of this order with all indorsements thereon, and served same on within-named The Topeka Water Supply Co., at county, dist. & State aforesaid by delivering a like copy of this writ as aforesaid to Joab Mulvane personally at 3 o'clock p. m. Feb. 5, '90, the said Joab Mulvane being then and there president of the defendant The Topeka Water Supply Company and served same on the within-named The Topeka Water Company at State, county & dist. aforesaid by delivering a like copy of this writ, as aforesaid, at 3

o'clock p. m., Feb. 5th, 1890, personally to Joab Mulvane, the said Joab Mulvane being then and there president of said defendant, The Topeka Water Co. and after diligent search I have been unable to find the other within-named defendants or any place of residence of said defendants in my district.

R. L. WALKER,
U. S. Marshal.
By L. D. DE BOST, *Deputy.*

Service, 6.00.

87 In the Circuit Court of the United States, District of Kansas.

SAMUEL HANSON and GEORGE P. WESCOTT, Complainants,)
vs.
JOAB MULVANE *ET AL.*, Defendants.)

STATE OF KANSAS,)
Shawnee County,) *ss:*

E. M. Shelden, being first duly sworn, deposes and says that he is treasurer of the Kansas Loan & Trust Company, of Topeka, Kansas.

That the said The Kansas Loan & Trust Company received from C. C. Domett, assistant cashier of the Maverick National Bank of Boston, Massachusetts, a letter dated the 17th day of January, 1890, enclosed with which letter was a sealed envelope addressed to Joab Mulvane. That such envelope was presented to said Joab Mulvane, which he refused to accept, saying that it could be sent to him through the United States mail. That on the 22nd day of January, 1890, said affiant wrote to C. C. Domett the letter hereto attached to this affidavit, and marked "Exhibit A" and made a part hereof.

E. M. SHELDEN.

Subscribed and sworn to before me this 12th day of February, 1890.

[SEAL.] CLIFFORD HISTED,
Notary Public.

My commission expires February 15, 1893.

Directors: John R. Mulvane, T. B. Sweet, Thos. A. Reed, Geo. M. Noble, E. M. Shelden.
Boston office, 153 Devonshire street.
Philadelphia office, Keystone national bank building.
Menzies, Coventry, and Black, Edinburgh, agents.

Paid up capital, $600,000.00.

The Kansas Loan & Trust Co., Topeka, Kansas.

Incorporated in March, 1873, for negotiating loans upon real estate and acting as trustee for estates and individuals. Loans negotiated exceed $20,000,000.

TOPEKA, KANS., *Jan. 22d*, 1890.

C. C. Dorrett, Esq., assist. cashier Maverick nat'l bank, Boston, Mass.

DEAR SIR: Herewith I return you the letter inclosed in yours of the 17th inst. to Mr. Joab Mulvane, as he declines to accept the same. He says it can be sent to him by the United States mail.

Yours truly, E. M. SHELDEN, *Treasurer.*

88 Indorsed: No. 6. Letter from the Kansas Loan & Trust Co. Returning letter of Symonds & Libby, attorneys, unopened.

In the Circuit Court of the United States, District of Kansas.

SAMUEL HANSON and GEORGE P. WESCOTT, Complainants,
vs.
JOAB MULVANE ET AL., Defendants.

STATE OF KANSAS, *Shawnee County*, } *ss:*

Chas. B. Smith, being first duly sworn, deposes and says that he is one of the solicitors for the complainants in the above-entitled action.

That on the 3rd day of February, 1890, there was received at the office of Rossington, Smith & Dallas, Topeka, Kansas, a package of papers from the said complainants, being the original papers referred to in their bill of complaint herein, and also a letter which is attached to the affidavit of E. M. Shelden, filed in this case. That pinned to said letter was the envelope hereto attached and marked "Exhibit A," and made a part hereof. That said envelope at that time was sealed and had endorsed thereon the endorsement appearing upon the same. That said envelope remained sealed until the 11th day of February, when the same was opened by said affiant, and when so opened said affiant took from it a letter directed to Joab Mulvane and signed by Joseph W. Symonds, which is hereto attached and marked "Exhibit B," and made a part hereof.

CHAS. B. SMITH.

Subscribed and sworn to before me this 12th day of February, 1890.

[SEAL.] CLIFFORD HISTED,
Notary Public.

My commission expires February 15, 1893.

Mess. Rossington, Smith & Dallas:

This letter was sent to Kansas Loan & Trust Co. to deliver to Joab Malvane, which said Mulvane declined to receive, and the same was returned to Maverick bank, unopened. I authorize you to open the same that you may see we promptly notified him of our proposed claims.

GEO. P. WESCOTT.

Jan'y 28, '90.

Indorsed: Joab Mulvane, Esq., Topeka, Kansas.

(If not called for in 5 days, return to Symonds & Libbey, Portland, Me.)

Opened by Chas. B. Smith, Feb'y 11th, '90.

89 Symonds & Libbey, counsellors-at-law, Portland, Me.

PORTLAND, ME., *Jan.* 14, 1890.

Jacob Mulvane, Esq., Topeka, Kansas.

DEAR SIR: Hon. George P. Westcott, of this city, has left with me for enforcement, a certain memorandum containing an offer of sale of the entire stock of the Topeka Water Supply Company, signed by you, and dated December 14th, 1889, which said offer was duly and formally accepted by Mr. Wescott and Mr. Samuel Hanson, of Boston, to whom it was made. The matter has been delayed on account of the illness and death of Mr. Wescott's sister, and also the serious illness of Mr. Wescott himself, he being confined to his room at present, but he desires that some action be taken in the premises without further delay.

I have advised Mr. Wescott that, in my judgment, there is no doubt that the offer of sale and acceptance above referred to, and dated December 14th, forms a complete and valid agreement for the sale of the stock of the Topeka Water Supply Company upon the terms therein stated, and such an agreement that its specific performance can be compelled by proper proceedings in a court of equity.

Mr. Wescott and Mr. Hanson stand ready, upon the signing of the agreement mentioned in the memorandum of sale, to make good their payments as therein stated, and to perform everything required of them to meet your written proposition, as they have already stated to you at the time of their personal interviews with you. They desire that the contract be carried out according to its terms, in good faith, and I am instructed to take such steps as may be necessary to enforce their rights.

As their attorney, therefore, and in their behalf, I take this opportunity to inform you of their present readiness and ability to make the payments required by your written proposition of December 14th, which was accepted by them, and to do all that is required of them by said contract, and I wish hereby to make a formal demand upon you for the execution of the new agreement and delivery of the stock

at the National Bank of North America in Boston, as contemplated by said agreement of December 14th.

Very truly yours, JOSEPH W. SYMONDS.

Indorsed: No. 6448. U. S. circuit court. George P. Wescott *et al.* vs. Joab Mulvane *et al.* Affdt. of E. M. Shelden & Chas. B. Smith. Filed Feb. 13, 1890. Geo. F. Sharitt, clerk.

90 *Affidavit of Joab Mulvane.*

In the Circuit Court of the United States for the District of Kansas.

GEORGE P. WESCOTT and SAMUEL HANSON, Plaintiffs,
vs.
JOAB MULVANE, THE TOPEKA WATER SUPPLY COMPANY, THE Topeka Water Company, William Edward Coffin, Walter Stanton, Charles Harvey Jackson and Charles Fawcett Street, Engaged in Business under the Firm Name and Style of Coffin & Stanton, and The Atlantic Trust Company, Defendants.

STATE OF KANSAS, } ss:
County of Shawnee, }

Joab Mulvane, of lawful age, being first duly sworn, deposes and says that he is the Joab Mulvane named as one of the defendants in the above-entitled cause; that he is acquainted with the above-named complainants, George P. Wescott and Samuel Hanson; that he became acquainted with said complainants in the city of Topeka, in the State of Kansas, in October and November, 1889. The affiant further says that he is and was at all the times hereinafter mentioned, president of the Topeka Water Supply Company, a corporation duly created and existing under the laws of the State of Kansas, and also a stockholder therein; that said complainant, Samuel Hanson, came to this affiant in Topeka some time during the month of October, 1889; or early part of November, 1889, and desired to know from this affiant whether the stock of the Topeka Water Supply Company was for sale or not, and if so upon what terms. This affiant then informed said Hanson that he did not know whether the stock of said company was for sale or not, or upon what terms, if any, the same could be acquired.

This affiant further says that afterwards, in the month of November, 1889, said complainants, both Wescott and Hanson, came to this affiant at his office in the city of Topeka, with propositions for the purchase of either a majority or all of the stock of said Topeka Water Supply Company; but this affiant refused to enter into any contract with said complainants at that time for the sale of any or all of said stock. And this affiant further says that at said time in November, he declined to make said complainants any proposition for the sale of any or all of said stock, and declined to consider all and every the propositions made by said complainants at that time for the purchase of said stock; that afterwards, affiant notified said

complainant Wescott that he expected to be in Boston
91 a certain time, and did go to Boston, and was there on th
14th day of December, 1889, and met said complainants at th
Parker house in said city; that negotiations were had for the sale
all of said stock of said Topeka Water Supply Company; that du
ing said negotiations, affiant told complainants that he was not th
owner of all of the stock of said corporation, and did not know ho
long it would take him to get all of said stock, and only had ther
with him, about three hundred and ninety shares of said stock; tha
he was willing to enter into a contract with them for the sale of a
of the stock, provided, a sufficiently large amount was paid dow
cash in advance, to assure him of the good faith and ability of th
proposed purchasers, and that they would carry out their contract
and he could have sufficient time to obtain control of the balance o
the stock which he then did not have; that after considerable talk
and late in the afternoon of said December 14th, affiant made said
complainants a proposition. One of said complainants, at his own
instance, after affiant had made a proposition, wrote down the propo
sition in substance as set out in complainants' bill, and asked affiant
to sign it, which he did; and thereupon, one of said complainants
wrote the acceptance of the same and said complainants signed said
acceptance. At the time of the making and acceptance of said propo
sition, it was understood and agreed that the complainants and affiant
should meet on the following Monday, to agree upon and execute a
contract for the sale of said stock. Said proposition and acceptance
were signed on December 14th, just before the parties separated for
that day. Said Wescott desired to go to Portland that evening and
not return till about 1 o'clock p. m. of the following Monday. Said
Hanson, before they separated, volunteered to block out a contract
and meet affiant at 10 o'clock on Monday, and suggested that per-
haps he and affiant could agree upon a contract before or by the time
said Wescott should arrive. It was the understanding of this affiant
at the time, and affiant believes was also the understanding of said
complainants at that time, that said proposition and acceptance was
only to be regarded as preliminary negotiations, which it was then
expected would terminate in a binding contract on the following
Monday, but which was not to become of binding effect until a
definite and complete contract for the sale of said stock, embodying
all necessary details, should be agreed upon and executed. Prior to
the signing of said proposition affiant had distinctly told complain-
ants that they must rely upon his responsibility to carry out any
contract that he might enter into, and referred them to Mr. I. F.
Barr, of Boston, and told them they could look up his financial
standing. During the negotiations of December 14th as to im-
92 mediate delivery of said shares of stock was at the time con-
templated. Such immediate delivery being, and being known
to said complainants to be an impossibility, and the placing of said
shares of stock in the bank at once was not at that time contemplated
by either of said parties, nor it was the understanding and meaning
of said affiant when said negotiations were being had, that he would
not be required to deliver any shares of stock to complainants until

money sufficient to pay for all of said stock had been placed in the bank, but that said complainants were to rely upon his contract and agreement and financial responsibility to comply with the terms of any contract he should make. There was no agreement or understanding as to when the shares of stock should be placed in the bank, but it was understood that it was impossible for affiant to place all of said shares there at once, and not for some time.

Affiant further says that on Monday following, being December 16th, 1901, said complainant Hanson came to him at the Parker house, in said city of Boston, about 11 o'clock a. m. of said day, but did not present any draft of contract, and affiant asked said Hanson if he had brought a contract with him. Said Hanson replied that he had not, and asked this affiant if he would go with him to see Mr. Potter, president of the Maverick bank. Affiant thereupon asked said Hanson what he wanted him to go to see said Potter for, and Hanson replied: "Why, about this matter." Affiant thereupon told said Hanson that he did not know Mr. Potter, and did not have any business with him that he knew of, and declined to go to see said Potter, and said that he did not want to negotiate with any other parties in respect to the matter; and thereupon this affiant asked Mr. Hanson to produce his contract, if he had one; to which said Hanson replied that he and Mr. Wescott would come around in the afternoon about 1 o'clock. Thereupon said Hanson went away, and in the afternoon between 1 and 2 o'clock said Hanson and said Wescott called upon this affiant at said Parker house, and thereupon affiant asked said Wescott and Hanson if they had a contract to present to him; and thereupon they presented a form of contract, a copy of which is hereto attached marked "Exhibit A," the original of which this affiant is ready to produce in court. Thereupon this affiant read over said contract carefully, and after reading the same stated to said complainants that he objected to signing the form of contract presented for the reason that it was at variance with the proposition and contained provisions that he could not and which they knew he could not comply with; and affiant also then told said parties that if he did sign such a contract they would not pay him any money, and that he considered it an unfair contract and that they were
95 trying to take advantage of him and get him to sign a contract which would be binding upon himself but not upon them, and that they knew that he could not deliver the stock at once and did not even control or possess all the stock and knew not how long it would take him to get it. Affiant asked them if they had inquired of Mr. Bacon as to his ability to carry out a contract. Affiant had told said complainants that they must rely upon their contract with him, and referred him to Mr. I. F. Bacon as to his ability to carry out a contract that he might make, and asked them if they had seen Mr. Bacon and what he said about affiant being able to carry out a contract. Complainants answered that they had seen Mr. Bacon, and that Mr. Bacon told them that he would as soon trust money to affiant as any man that ever came into his bank, but that he could not guarantee affiant's life or that affiant would live to deliver this stock, in which case they said they might have a lawsuit

on their hands. Affiant said that he had told said complainants definitely from the beginning that they were to rely upon the contract which affiant made, if one was made, and told them that he had never asked Mr. Burr to guarantee his life or the delivery of the stock, and told them if they found affiant to be financially responsible and reliable, that a contract could be enforced against his successors if he should die; that he would not sign any contract which did not give him sixty thousand dollars in cash, nor would he sign a contract which they knew and which affiant knew he could not comply with. Complainants then insisted and at all times insisted that affiant should sign a contract binding himself to at once place in the hands of the cashier of the National Bank of North America, the certificates representing the entire capital stock of the Topeka Water Supply Company, indorsed in blank. The contract as originally presented to affiant, did not contain the erasures or pencil interlineations as now shown by said form of contract. During the discussion that followed the presentation of the form of contract the complainants made the erasures and interlineations as now appear upon said contract, and would make no others. The said interlineations and erasures were made after the objection to the contract by this affiant, and were not made upon any suggestion of this affiant; that with such erasures and interlineations the contract would be satisfactory to him. Complainants insisted upon this contract as they had changed it. Said complainants did not on said day tender any other contract to this affiant, but during all the time insisted upon this affiant signing said contract with such changes and interlineations as are shown upon the copy hereto attached, and refused to make, execute or accept any other form of contract
94 than the one tendered by them; that at no time during said Monday or at any other time, did the said complainants tender the sum of sixty thousand dollars or any other sum to this affiant. Affiant told them that he did not believe they had any money, and that they did not intend to pay him any money, and that they were urging upon him a contract which would not give him any money, and that he did not believe that they had any money, and that money was very tight in Boston, and that they had not convinced him in any way or by any evidence that they had a dollar or were willing to give him a dollar. This discussion continued the afternoon until dusk, about three hours. Affiant after considerable discussion, told said complainants that he would spend no more time negotiating with them, that they had declined and refused to pay him any money, and insisted upon a contract which they knew and he knew could not be complied with and which would be binding upon him and not upon them. Thereupon said complainants said let us sleep over this thing, and we will meet you tomorrow. Affiant told them that he would not meet them tomorrow; that he withdrew all propositions, and that all previous negotiations are wiped out, but that if they had a new proposition to make, they could make it in black and white and address him over Bullard Bank at Seattle Reservation; affiant left Boston on Tuesday the 17th,

and went to New York to see whether he could not negotiate the stock, affiant being desirous of disposing of said stock.

Affiant further says that all times during the pendency of said negotiations, and until he declared the same off, he was willing and ready to sell said stock for the price and upon the terms of payment provided in said proposition, and was ready and willing and would have carried out and complied with the spirit and intention of the negotiations of December 18th, had said complainants been also willing to do the same, and had not affiant became convinced that they were seeking to get an advantage of him.

And affiant further says that neither of said complainants nor any one for them, have since said day, at any time offered to make any contract with said affiant for the purchase of said stock, or tendered said affiant any money as part payment therefor until the present time, unless such a contract was tendered by Mr. C. B. Smith, one of complainants' solicitors, which tender, if any was made by said Smith presenting a paper to this affiant about an hour before the service of the restraining order in this suit, which paper said Smith asked this affiant to sign; but this affiant does not know the contents of said paper, and refused to examine or sign the same, said affiant having sold all of said stock long prior to said paper being presented by said Smith.

95 And affiant further says that after said negotiations had been declared off, he went to New York on the 17th of December, 1889, for the purpose of trying to sell said stock, and while there on or about the 18th day of December, 1889, sold all of said stock to the firm of Coffin & Stanton of the city of New York and Woodbury and Moulton, partners doing business in the city of Portland in the State of Maine. And affiant further says that the said firm of Woodbury & Moulton consist of William H. Moulton, Theo. C. Woodbury and Edward H. York; that each of the members of said firm of Woodbury *and* & Moulton are citizens and residents of the city of Portland and State of Maine, and are and *was* as aforesaid, residents and citizens of the same State of which the said complainant, George P. Wescott, is and was a resident and citizen at the time of the commencement of this action; that said sale was made by this affiant to said two firms in good faith, and said parties paid to this affiant as part payment on said sale, the sum of fifty thousand dollars in cash, and it was then and there agreed that the balance of said purchase-moneys should be paid and the said stock should be delivered on the 10th day of February, 1890.

Affiant further says that the Topeka Water Company was organized through his efforts wholly at the request and for the benefit of the purchasers of said stock, as they were desirous of having the franchises and property in connection of a corporation with a greater capital stock than provided for by the charter of the Topeka Water Supply Company.

And this affiant further says that at the suggestions of the purchasers of said stock, he used his efforts in procuring the passage of an ordinance by the city council of the city of Topeka authorizing the conveyance of the privileges and franchises heretofore granted to

the Topeka Water Supply Company by said city of Topeka to the Topeka Water Company; that such ordinance was passed and accepted, and a conveyance was made and duly executed by said Topeka Water Supply Company, conveying all of its property and all of the rights and franchises granted it under the ordinances of the city of Topeka, to the Topeka Water Company. A copy of said deed is filed in the office of the clerk of said city of Topeka, all of which was done prior to the commencement of this suit, affiant having no knowledge of the intention to commence such suit.

Affiant further says that he has no interest in the Topeka Water Company, excepting in so far as he has acted in procuring the organization of said company for the benefit of the purchasers of the stock of the said Topeka Water Supply Company, as heretofore stated. And further affiant sayeth not.

JOAB MULVANE.

96 Subscribed and sworn to before me this 12th day of February, 1890.

[SEAL.] GEO. F. SHARTT, *Clerk.*

"EXHIBIT A."

The Brunswick, Barnes & Dunklee, Boston.

Agreement made and entered into this 14th day of December, 1889, between Joab Mulvane, of Topeka, Kansas, party of the first part, and Geo. P. Wescott, of Portland, Maine, and Sam'l Hanson, of Boston, Mass., party of the second part.

The said party of the first part hereby sells and agrees to have properly assigned, transferred and delivered to said party of the second part, upon terms of payment hereinafter named, the entire capital stock of the Topeka Water Supply Company of Topeka, Kansas, which consists of four thousand shares of the par value of one hundred dollars each for the sum of five hundred thousand dollars. The party of the second part hereby purchases and agrees to pay for said four thousand shares of Topeka Water Supply stock as follows: Sixty thousand dollars on signing this agreement, two hundred thousand dollars on the 10th February, 1890, one hundred and forty thousand dollars on the 20th day of February, 1890, and the further sum of one hundred thousand dollars on the 20th day of February, 1890, unless said party of the second part elect to pay said one hundred thousand dollars on the 20th of March, 1890, which they may do on giving notice of such intention to the party of the first part five days prior to said 20th Feb'y. The party of the first part also agrees to at once place in the hands of the cashier of the National Bank of North America in the city of Boston, Mass., the certificates representing the entire capital stock of the Topeka Water Supply Company before named, which certificate indorsed shall be transferred in blank. It being the intention of this agreement that the said stock shall be delivered and paid for at the said National Bank of North America. The party of the second part

also agrees to pay to the party of the first part interest from the first day of January, 1890, at the rate of six per cent. per annum, on the sums amounting to four hundred and forty thousand dollars, until the date on which said sums are paid to the party of the first part. In consideration for which the party of the first part hereby agrees [(that the party of the second part shall receive all monies or incomes from any source to which the Topeka Water Supply Company may be entitled from the first day of January, 1890, and)]*
97 that said corporation shall be turned over to said party of the second part after full payment for said stock (on the first day of Jan'y, 1890), free from all debts and encumbrances of every kind, except the funded debt consisting of one hundred & twenty thousand first-mortgage bonds.

Verbatim ad letteratim,
Attest:

D. W. MULVANE.

Indorsed: No. 6448. Affidavit of Joab Mulvane. Filed Feb. 12, 1890. Geo. F. Sharitt, clerk.

In the Circuit Court of the United States for the District of Kansas.

GEORGE P. WESCOTT and SAMUEL HANSON, Complainants,
vs.
JOAB MULVANE ET AL., Defendants.

STATE OF KANSAS, *Shawnee County,* } *ss:*

Joab Mulvane, of lawful age, being first duly sworn, deposes and says, that it is not true as stated in the affidavit of said complainant Wescott, that the paper presented by said complainants at Topeka was satisfactory to this affiant, and affiant says that he did not assent to or in any manner agree to the proposition contained in said paper, and that he did not say to said complainants that he would in ten days, send them the said paper signed by him or declare the trade off, but on the contrary said affiant says that at the time he declined to consider all and every the propositions made by said complainants; that it is not true as stated in the affidavit of said Wescott that affiant did not make any further objections to the contract as submitted, except with reference to the taking possession of the company by said complainants, but, on the contrary, he objected to said contract as stated and set forth in his previous affidavit.

Affiant further says that he has no recollection of being shown at any time a letter, a copy of which is set out in the affidavit of said Wescott, or of reading any such letter, and says that he did not make the statement that the recommendation therein contained was certainly good enough to show that they were acting in good faith throughout, as affiant did not believe at the time said statement is claimed to have been made that they were acting in good faith.

[* Words and figures enclosed in brackets erased in copy.]

Affiant further says that said Hanson did not refer this affiant to the Maverick bank or to any person in regard to his ability
98 to perform a contract. That neither of the complainants told affiant that Mr. Potter was one of the parties in interest and never told affiant who their associates were, if they had any.

Affiant says that during these negotiations in Boston he found, by examining the city directory of Boston, that said Hanson was a bond clerk in the Maverick bank, and affiant says that he did not say to said Hanson that his reason for asking a price in excess of five hundred thousand dollars was that he had not bought a single share of the stock for which he had not paid more than par, or anything in substance to that effect.

Further, affiant says that it is not true that he declined to discuss the contract, but says that said contract was under discussion all of Monday afternoon, December 16th, 1889, and that such changes as were made were made after objections by affiant, and that complainants refused to make other and important changes that affiant insisted upon, particularly with reference to placing the shares of stock in the bank at once, and further saith not.

JOAB MULVANE.

STATE OF KANSAS,)
Shawnee County,) ss:

Subscribed and sworn to before me this 12th day of February, 1890.

[SEAL.] ALFRED G. BASS,
Notary Public.

Commission expires July 20, '93.

Indorsed: No. 6448. Affidavit of Joab Mulvane. Filed Feb. 13, 1890. Geo. F. Sharitt, clerk.

PORTLAND, ME., *Dec. 17th*, 1889.

I, Geo. P. Wescott, of Portland, Maine, make the following statement in regard to the negotiations and transactions had with Joab Mulvane, of Topeka, Kansas, relating to the purchase of the water works of the Topeka Water Supply Company, Topeka, Kansas. Said negotiations being conducted on the one side by said Mulvane, owning, in his own right, more than a majority of the capital stock of the Topeka Water Supply Company (capital stock of said company being $100,000,) and on the other side by Geo. P. Wescott, of Portland, Maine, and Samuel Hanson, of Boston, Massachusetts.

On the twelfth day of November, in the afternoon, myself and Mr. Hanson were at the office of Mr. Mulvane, in Topeka, Kansas, pursuant to an arrangement made between said Mulvane and
99 Hanson some three or four weeks prior to this date. We found Mr. Mulvane at his office and obtained from him his consent to make such examination of the plant and the works of the company as we desired to make.

On the following day it was arranged to meet Mr. Mulvane in the morning and examine the books of the corporation and later to enter into negotiations for the purchase of the plant. Accordingly we

visited the pumping station, on the banks of the Kansas river and made an inspection of the entire city, as we deemed desirable and proper, relating to the standing of the affairs of this corporation.

On the following morning we met Mr. Mulvane and went with him to examine the books of the corporation at the office of the water company. Finding everything in satisfactory condition it was arranged to meet Mr. Mulvane at the hotel after dinner and see if we could agree on the price to be paid for the property. At about half past two Mr. Mulvane came to the hotel, with Mr. Shaw (in the employ of the company). Mr. Shaw having been brought to the hotel at our request, to interview him in regard to the pipe distribution of the company, of its condition, etc. After Mr. Shaw had left the room, negotiations were opened with Mr. Mulvane, at which time Mr. Mulvane expressed a willingness to undertake the purchase of the balance of the capital stock and sell the entire property to us for the sum of $500,000. This sum Hanson and myself deemed too large, and had previously offered him $450,000. Finally this sum was raised to $475,000, which was declined by Mr. Mulvane, and it was agreed that we were to meet Mr. Mulvane at 5 o'clock in the afternoon and would then determine if we would pay the sum asked by him, namely, $500,000, or not.

At 5 p. m. we met at his office by appointment and went into a private room attached to the bank, adjoining his office, and there we agreed to pay him the sum asked by him, namely, $500,000. With that object in view, the following memorandum was prepared for signatures of the parties, which was satisfactory to Mr. Mulvane:

Copy.

Joab Mulvane, prst.; M. O'Brien, sec't'y.

The Topeka Water Supply Company. Office, 111 East Seventh street.

TOPEKA, *Nov.* 13, 1889.

Whereas, Joab Mulvane, Esq., of Topeka, Kansas, and his associates, own the stock of the Topeka Water Supply Company, said Mulvane owning, in his own right, a majority thereof, and being disposed to sell his stock and to advise his associates to sell their stock in said company, on the terms and conditions hereinafter stated; and whereas, Geo. P. Wescott, of Portland, and Samuel Hanson and associates desire to purchase the capital stock and property of said water company.

It is hereby agreed that said Wescott and Hanson will pay said Mulvane and associates par for said stock and to pay to Joab Mulvane, Esq., the further sum of one hundred thousand dollars for the control and carrying out of the above sale and transfer of said stock to said Wescott and Hanson, delivery thereof to be made in New York or Boston, as said Mulvane may elect. Said Mulvane, on his part, agrees to deliver said stock, amounting to $400,000, par value, on or before January 1st, 1890, also to perform such services in formation

of a new company, if one is required, to be performed as said Wescott and Hanson may require to be done.

(Signed) GEO. P. WESCOTT.
SAMUEL HANSON. [SEAL.]

The foregoing agreement was written out in duplicate, we expecting that Mr. Mulvane would sign one and we the other. We signed ours, as the signatures appear above; but Mr. Mulvane said he could not then sign a paper which bound him to do something which he did not know if he could do or not, but that he would take the matter under consideration and at once obtain the consent of his associates and within ten days he would send us his paper, duly signed, and we might return ours duly signed, or he would declare the trade off.

At the expiration of said ten days, namely, November 22nd, he addressed the following letter to me:

DEAR SIR: I cannot write you anything definite today. Will write you again, or may see you, as I expect to be in Boston in the near future, and will advise you when I will go East, soon as my broken arm will allow.

Respectfully yours, JOAB MULVANE.

I replied at once that I should be pleased to meet him in Boston any day that he might name, and that my address was the Parker house, Boston.

On December 4th, he wrote me as follows:

DEAR SIR: I expect to be in Boston on the 14th inst., and will call at the Parker house, and shall be pleased to meet you.

Please accept my thanks for your courtesy for sending the form for accounts.

101 I shall be able to talk and act definitely with you as to the business matter heretofore discussed.

May I congratulate you on the triumph of your Mr. Reed for Speaker?

My right arm is yet in limbo and writing is a difficult task.

Respectfully yours, JOAB MULVANE.

December 13th I received the following telegram, dated in Boston:

Will be at the Parker house today and tomorrow.

(Signed) JOAB MULVANE.

I replied that I would meet him in Boston on Saturday at 11.30 a. m. At 11.30 a. m. I was at the Parker house, and waited until 12.45 for Mr. Mulvane to keep his appointment. At that time he came and explained his delay had been occasioned by a meeting of the directors of his railroad, where he was required to make a quorum. Mr. Mulvane, Hanson and myself retired to room 304, on the second floor, where Mr. Mulvane stated that he now owned in his own right $388,000 of the stock of the Topeka Water Supply Com-

pany, leaving but $12,000 of stock to be acquired, which he expected to have in a very few days, so that then he was in position to sell and deliver the entire stock, except $12,000; that he had actually purchased the stock and now owned it, but that it had cost him more money than he expected and that he could not sell the stock at the price he had named in Topeka; that he should require at least $50,000 more than the price then named. After considerable talk and our insisting, that while he had a perfect right to declare this transaction off, yet we understood it to be agreed that if he could acquire the stock and it was possible to carry out the transaction, that it would be done at the price named in the agreement of November 13th, and that, inasmuch as he had carried it out and could accomplish it, we certainly felt that the sum which we had then offered should be accepted by him and the stock delivered to us; that he had been acting as our agent in acquiring the stock, and that it should be delivered to us. After considerable negotiation, he finally said that $25,000 additional or $525,000, was the very lowest sum at which he would sell the property, and would require $50,000 paid on account at time of signing the contract. After further conversation Mr. Hanson and myself retired from the room for a conference with our associates to see if they would pay the $25,000 extra or not. Being unable to find but one of our associates, and he being adverse to paying the additional sum, we retired to the room
102 and told Mr. Mulvane that $500,000 was our best offer and must be accepted today. He absolutely declined to sell at any less sum than $525,000, and declared that all negotiations were off. We put on our coats and hats and started to leave the room but in reply to a question as to how the matter was left, we intimated to Mr. Mulvane that we were left in a peculiar manner with our friends, inasmuch as we had gone to Topeka and made what we supposed to be a trade for the plant, conditionally that the stockholders would sell the stock, but now we found that while the stockholders had agreed to sell the stock and he had bought it in our interest, we were being charged a higher sum and we could not well explain to our associates this advance, and that we really preferred to abandon the whole trade rather than to have any suspicion cast on us by our associates that we had not explained to them the whole story when we returned from Topeka. Mr. Mulvane replied that he realized the position which we occupied and that he was now inclined to accept our proposition, provided we would pay him the sum of $60,000 cash, on signing of the contract instead of $50,000 before asked for; that he could use that sum to advantage and would like to have it. He also stated that he had but $40,000 of the stock in hand, but he felt sure that Mr. Burr, the president of the Bank of North America, in the city of Boston, would be willing to guarantee that the payment of $60,000 on account would be a safe thing for us to do. Accordingly, after considerable negotiation and discussion, the following paper was drawn up and duly signed by all the parties. When Mr. Mulvane had put his signature to the paper he said to us: "There, that is settled now. You have my signature, which you didn't have

when we were in Topeka." The following is a copy of the agreement made in Boston:

BOSTON, *Dec. 14th*, 1889.

GENTLEMEN: I will sell you the entire capital stock of the Topeka Water Supply Company, of Topeka, Kansas, which consists of 1,000 shares of par value of $100 per share, for the sum of five hundred thousand dollars ($500,000) on the following terms of payment, viz: The sum of sixty thousand dollars ($60,000) to be paid in cash on the signing of a contract to be made and entered into as of this date, the consideration named in said contract to be four hundred and forty thousand dollars ($440,000) to be paid as follows, viz: The sum of two hundred thousand dollars ($200,000) to be paid February 10th, 1890, one hundred and forty thousand dollars ($140,000) to be paid February 20th, 1890, and one hundred thousand
103 dollars ($100,000) to be paid March 20th, 1890, provided that final payment of the last-named sum of one hundred thousand dollars may be paid on February 20th, if said Wescott and Hanson may elect so to do, by giving me five days' notice of such intention. Payments to be made for and delivery of said stock to be made at the National Bank of North America, in the city of Boston, Mass.

(Signed) JOAB MULVANE.

To Geo. P. Wescott, Samuel Hanson.

We hereby accept your offer to sell the entire capital stock of the Topeka Water Supply Company for the price and on the terms and conditions above stated.

(Signed) GEO. P. WESCOTT.
SAMUEL HANSON.

It was now half past six, p. m. and I was to take the train for Portland at seven o'clock; I bade them good night with the understanding that Mr. Hanson and Mr. Mulvane would prepare the contract on Monday morning and that I would return to Boston Monday at 1.30 to sign the contract and complete payment, agreeable to the terms of the agreement signed Saturday evening.

Monday morning I returned to Boston and at 1.30 went to Mr. Mulvane's room, No. 63, on the second floor, and found the same locked. I then went to the Maverick bank and saw Mr. Hanson, who informed me that the money was ready to pay to Mr. Mulvane to the amount of $60,000, but he had not seen Mr. Burr, president of the Bank of North America, to ascertain if Mr. Mulvane was responsible and if they would guarantee a payment of the nature proposed to be made to Mr. Mulvane on the signing of the contract. I at once called on Mr. Burr and asked him the standing of Mr. Mulvane. In reply he said that it was the highest possible credit and that he was a thoroughly responsible, reliable party and he had the fullest confidence in his integrity. I then stated to him that I was to pay Mr. Mulvane $60,000 and asked him if he would be responsible for the honest and safe delivery to us of the stock of the water company, provided we made payment to Mr. Mulvane, as we intended. His reply was prompt and to the point that he would not guarantee the

life of any man, which was in effect what I was asking him to do. Further than that, Mr. Mulvane ought not to ask us to do a thing that he would not do himself. He didn't believe the transaction was quite such a one as Mr. Mulvane would insist on having carried out. I returned to the Maverick bank at once and stated what Mr. Burr had said, both to Mr. Hanson and to the president of the bank, Mr. Asa Potter. Mr. Hanson showed me a memorandum of agreement which he had prepared for the signature of Mr. Mulvane and myself, but stated that he had not submitted it to Mr. Mulvane and was waiting for me to go with him and meet Mulvane, when we would submit the memorandum and allow Mr. Mulvane to make such changes as he desired to make: that Mr. Mulvane had, in the morning, declined to come to the bank to confer with him, and had also declined to have the contract done by a lawyer, that he wanted it to be as simple as possible.

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At 12:30 p. m. Mr. Hanson and myself went to the Parker house and met Mr. Mulvane in the office and retired to his room, No. 63, where we gave him the form of contract prepared by Mr. Hanson, to look over and asked him what changes he would suggest. The following is a copy of the contract:

Agreement made and entered into this 14th day of December, 1889, between Joab Mulvane, of Topeka, Kansas, party of the first part, and Geo. P. Wescott, of Portland, Me., and Samuel Hanson, of Boston, Mass., party of the second part.

The party of the first part hereby sells and agrees to have properly assigned, transferred and delivered to said party of the second part, upon terms of payment hereinafter named, the entire capital stock of the Topeka Water Supply Co., of Topeka, Kansas, which consists of four thousand shares of the par value of one hundred dollars each, for the sum of five hundred thousand dollars.

The party of the second part hereby purchases and agrees to pay for said four thousand shares of Topeka Water Supply stock as follows: Sixty thousand dollars on signing this agreement, two hundred thousand dollars on the 10th day of February, 1890, one hundred and forty thousand dollars on the 20th day of February, 1890, and the further sum of one hundred thousand dollars on the 20th February, 1890, unless said party of the second part elect to pay said one hundred thousand dollars on the 20th March, 1890, which they may do on giving notice of such intention to the party of the first part five days prior to said 20th of February.

The party of the first part also agrees to at once place in the hands of the cashier of the National Bank of North America, in the city of Boston, Mass., the certificates representing the entire capital stock of the Topeka Water Supply Company, before named; which certificates shall be transferred in blank. It being the intention of this agreement that the stock shall be delivered and paid for at the said National Bank of — America.

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The party of the second part also agrees to pay to the party of the first part, interest from the first day of January, 1890,

at the rate of six per cent. per annum, on the sums amounting to four hundred and forty thousand dollars, until the date on which said sums are paid to the party of the first part. In consideration for which the party of the first part hereby agrees that said corporation shall be turned over to said party of the second part on the first day of January, 1890, free from all debts and encumbrances of every kind, except the funded debt, consisting of one hundred and twenty thousand first-mortgage bonds.

He at once objected to our taking possession of the company on January 1st, because he had not then obtained the last $12,000 of stock, and it might be impossible to do so before January 1st. We then suggested making a change, so that the possession of the company should be taken after the delivery of all the stock, agreeable to the terms of the agreement of December 14th. He did not seem satisfied with this arrangement, but did not make further objection to the contract as submitted. In conversation we told him that we had a conference with Mr. Burr in regard to his standing and business integrity, which we explained had been made necessary because the bank closed at two o'clock, and we wished to know before meeting him whether Mr. Burr would guarantee the performance of the agreement which Mr. Mulvane had said to us Saturday evening that Mr. Burr would do. I informed him that Mr. Burr had given him a high recommendation for integrity and financial ability, but he was not willing to guarantee the safe delivery of the stock agreeable to the terms of the contract provided for, and did not think that Mr. Mulvane should ask us to do so, until the stock had been put up against the money in the hands of some bank or responsible person, then he, Mulvane, said I understand you will not put up the money unless I put up the stock, and this means more delay. We replied, that inasmuch as Mr. Burr would not guarantee his so doing, we must insist on some security. He took the ground that this was an evasion of the contract and that we ought to pay the money to him, because he was responsible, and he had expected that his standing at home and his well-recognized financial ability to make good his promises would be accepted here readily, and that we should make the payment of $60,000 without his putting anything against it except his receipt on account, and he thought the recommendation Mr. Burr had given him was ample and all that had been contemplated or expected by him at the time of our interview on Saturday, and he expected that we would pay the money on the recommendation given by Mr. Burr.

106 At this point Mr. Hanson said to Mr. Mulvane that he certainly should not ask us to do what he would not do himself, and that we would not expect him to trust us for any part of the payment down, and that in support of our ability and competence to pay, that Mr. Wescott had a letter from the Casco bank as to his standing in Portland, which was equally as high as that which Mr. Mulvane had in his own town. At this point I passed Mr. Mulvane the following letter for him to read, stating to him that before our interview with him on the 14th the cashier of the Casco bank had been asked for a letter to be addressed to him, which he

had given me, but when he asked for a deposit of $60,000 I did not suppose that the letter would be any object for him to think of, or even to read, and I hadn't presented the letter to him, and did not do it now, only to show that my standing was equal to that given him by Mr. Burr. A copy of the letter is as follows:

The Casco National Bank of Portland, Maine.

DECEMBER 13TH, 1889.

Joab Mulvane, Es., Topeka, Kansas.

DEAR SIR: I address you this letter that you may know the reputation for responsibility which Hon. Geo. P. Wescott of this city enjoys should you desire such knowledge.

Mr. Wescott is the surviving partner of the firm of Joseph Wescott and Son, and as a business man has been engaged in some of the largest industrial enterprises in this section, and with uniform success in results. He is considered in this community to be a man of wealth, and is always equal to his agreements. We have known him in this bank as one of its most valued directors for more than eighteen years, and have no hesitation in recommending him to any one with whom he may have business relations, as a man perfectly reliable and responsible to the extent of any engagements he would make. This is our opinion of him and we feel it is the sentiment of all those who know him in this city and State.

Yours respectfully,

(Signed) M. R. GODING, *Cashier.*

Mr. Mulvane, having read the letter, said that the recommendation was certainly good enough to show that we were acting in good faith throughout.

107 Room 63 being very cold, we then went to room 304 and continued our negotiations. Mr. Mulvane had possession of the memorandum which Mr. Hanson had drawn and had it in his pocket; I asked for the copy and undertook to get Mr. Mulvane to agree to such modifications of the contract as would meet his views and make it so that he would sign the same; he absolutely declined to discuss the contract or to suggest any change to be made in any manner whatever. I made some changes in pencil on the memorandum, which will appear in my handwriting. Mr. Mulvane left the room and when he came back about half past five, he said that he was satisfied that we could not raise the money and consequently he had determined to declare the whole matter off, and opened the door and left the room; we called him back and suggested that he return the memorandum which he had in his pocket, which he declined to do, saying that he supposed we had a copy of it; we assured him that we had no copy and that it was only a rough draft on which we had asked him to make such changes as would meet his views, but on which he had declined to make any suggestions or enter into any conference whatever in relation to the matter; he, being pressed for the paper, agreed to have a copy made and return the paper at once; at half past six he returned the typewriter's copy to us, saying that he should keep the original and that all negotiations were off,

so far as he was concerned; we then asked him if we could have an interview with him in the morning at the Bank of North America, where we had no doubt that with Mr. Burr present, we could arrange all matters in an amicable and satisfactory manner; he declined to hold any further interviews with us, but said that any communication we had to make, left at the Bank of North America, would be considered by him, but that he didn't want to have any further conversation with us on present negotiations.

GEO. P. WESCOTT.

I, Samuel Hanson, of Boston, Massachusetts, being present at each and all of the interviews pending the making of the negotiations and transactions had with Joab Mulvane, of Topeka, Kansas, relating to the purchase of the water works of the Topeka Water Supply Co., Topeka, Kansas, hereby certify that I have read the foregoing statement made by Geo. P. Wescott, of Portland, Maine, relating thereto, and find the same to be correct, according to the best of my recollection.

I would, however, make the following additions to his statement: My recollection is that when we referred to making payments of $60,000 at National Bank of North America, Mr. Mulvane said that Mr. Burr would give us such assurances that the matter would be perfectly satisfactory to us, and with that statement we left the matter. I also referred him to the Maverick national bank in regard to my own ability to perform the contract, stating that Mr. Potter was one of the parties at interest. Mr. Mulvane also stated that his reason for asking a price in excess of $500,000 was that he had not bought a single share of the stock for which he had not paid more than par. I would also add that on the 17th inst. Mr. Potter wrote Mr. Mulvane at New York expressing surprise at his action and requesting that all papers be laid before Mr. Burr, the president of the Bank of North America, and we abide by his decision, but up to this date no reply has been received.

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SAMUEL HANSON.

Boston, December 21, 1889.

No. 5.

Statement Made by Geo. P. Wescott and Samuel Hanson, Dec'r 17 & 21, 1889.

COMMONWEALTH OF MASSACHUSETTS, } ss.
County of Suffolk, }

On this twenty-eighth day of January, A. D. 1890, before me, Samuel Jennison, a commissioner of the State of Kansas, residing in Boston, duly commissioned and qualified to make affidavits, &c., for said State, personally appeared in said Boston Geo. P. Westcott, of Portland, Maine, and Samuel Hanson, of said Boston, and severally made oath that the statements and all matters and things set forth in their writings hereto attached and signed by them respectively, are true, to the best of their knowledge and belief.

In witness whereof I have hereto set my hand and official seal, at said Boston, this 28th day of January, A. D. 1890.

[SEAL.]

SAMUEL HASSES,
Commissioner for Kansas in Boston.

Indorsed: No. 6118. U. S. circuit court. Samuel Hassen et al. vs. Joab Mulvane et al. Affidavit of Geo. P. Wescott. Filed Feb. 13, 1890. Geo. P. Sheritt, clerk.

In the Circuit Court of the United States, District of Kansas.

George P. Wescott and Samuel Hasses, Complainants,
vs.
Joab Mulvane, The Topeka Water Supply Company, The Topeka Water Company, William Edward Coffin, Walter Stanton, Charles Harvey Jackson, and Charles Fawcett Street, Partners Engaged in Business in the City and County of New York, State of New York, as Coffin & Stanton, and The Atlantic Trust Company, Defendants.

And now, on this 13th day of February, A. D. 1890, this cause coming on to be heard upon the application of said complainants for a temporary injunction herein, as prayed in the bill of complaint herein, and said parties being present by their counsel, to wit, the said complainants by Rossington, Smith & Dallas, and the said Joab Mulvane, the Topeka Water Supply Company and the Topeka Water Company by J. D. McFarland, Hurd & Dunlap and Eugene Hagan, and evidence being presented to the court and the same being argued by counsel, upon consideration whereof, it is, by the court,

Considered, ordered and adjudged that upon said complainants' giving bond in the sum of seventy-five thousand dollars, to be approved by the court, by the 15th day of February, 1890, the said Joab Mulvane, the Topeka Water Supply Company and the Topeka Water Company, and all others acting by, under or through them, or as their agents, emissaries or employés, be enjoined and restrained, pending this suit, or until the further order of this court, from putting upon record any deed or conveyance to the franchises or property in said bill described, to wit, the water works of said city of Topeka, Shawnee county, Kansas, which upon the 14th day of December, 1889, stood in the name of and were owned, controlled and operated by the said The Topeka Water Supply Company, said plant consisting of real estate and appurtenances, such as wells, pumping station, machinery and the like, and water-supply pipes underlying the streets and alleys of the city of Topeka, with all hydrants and attachments of whatsoever nature appurtenant thereto.

It is further considered, ordered and adjudged that said parties be enjoined from signing, sealing or negotiating any such bonds as are described in the circular of Coffin & Stanton in said bill mentioned and described, or in anywise incumbering, conveying or disposing of the title to said water works and franchises, or any part thereof.

110 *That the said Joab Mulvane, as president of said water companies, and said water companies, and said Joab Mulvane individually, be enjoined and restrained from further carrying on said negotiations or delivering said bonds, or executing said bonds or putting said bonds upon the market, or from requesting said trustee to certify the same, or from requesting said trustee to act in any matter in connection with said scheme or enterprize looking to the formation of the Topeka Water Company and its acquirement of said franchises, or from distributing or selling any of said stock of said The Topeka Water Company or the Topeka Water Supply Company, or further ordering or directing said Collin & Stanton to carry on said negotiations; and that all of said parties be enjoined and restrained from offering said stock of the Topeka Water Supply Company or the Topeka Water Company upon the market, or from canceling any of the stock of the said The Topeka Water Supply Company, or from turning over the books of said The Topeka Water Supply Company, or from in anywise impairing, affecting or terminating the active existence of said The Topeka Water Supply Company as the owner and operator of the franchises aforesaid, or from delivering or assigning any of the stock of the Topeka Water Company to any person or persons whomsoever.*

It is further ordered that a copy of this order be entered upon the journal of this court.

C. G. FOSTER, *Judge.*

Indorsed: No. 6148. Order. Filed Feb. 13, 1890. Geo. F. Sharitt, clerk.

Copy of Order.

In the Circuit Court of the United States, District of Kansas.

GEORGE P. WESCOTT and SAMUEL HANSON, Complainants,
vs.
JOAB MULVANE ET AL., Defendants. } No. 6148.

Now, on this 15th day of February, 1890, it is ordered by the court in the above-entitled cause, that in lieu of a bond for seventy-five thousand dollars, the said complainants herein may deposit with the clerk of this court the sum of seventy-five thousand dollars in cash, and that said deposit shall stand for a bond for all damages from commencement of this suit until the further order of the court whereby said complainants will be obligated and bound to pay to the defendants all costs and damages aforesaid, if it shall be finally held that said injunction or restraining order was improvidently granted.

C. G. FOSTER, *Judge.*

111 Indorsed: No. 6148. Order. Filed Feb. 15, 1890. Geo. F. Sharitt, clerk.

In the Circuit Court of the United States for the District of Kansas.

George P. Wescott et al., Complainants,
vs.
Joab Mulvane et al., Defendants. } #6118.

We enter ourselves sureties for costs in said case, and promise to pay all costs which may accrue to the opposite party in this action, or to any of the officers of this court. And in default of payment by the plaintiff of any costs ordered or adjusted to be paid by them, we hereby agree and stipulate that execution may issue against our property for any costs taxed against them.

Dated 17th day of February, 1890.

ROBINSON, SMITH & DALLAS.

#6118. Cost bond. Filed Feb. 17, 1890. Geo. P. Sharitt, clerk.

In the Circuit Court of the United States for the Dist. of Kansas.

GEO. P. WESCOTT & SAMUEL HANSON, Complainants,
vs.
JOAB MULVANE ET AL., Defendants.

Comes now Wm. H. Moulton, Theo. C. Woodbury and Edward York, partners, doing business under the firm name of Woodbury and Moulton, and files this their application to be made parties defendant in the above-entitled cause for the following reasons:

1st. That they are necessary and indispensable parties defendant in said cause to a full determination of the questions involved in said cause, and are interested in the subject-matter of the suit.

2nd. That prior to the commencement of said suit they, with Cobb & Stanton named as defendants in said suit, had, in good faith, for a valuable consideration, and without notice of any claims of said complainants, purchased from Joab Mulvane, defendant above named, and became the absolute owners of all the capital stock of The Topeka Water Supply Company, defendant above named.

All of which will fully appear from affidavits and other evidence on file, and to be presented upon the hearing of this motion.

J. D. McFARLAND,
EUGENE HAGAN,
HURD & DUNLAP,
Attorneys for Woodbury & Moulton.

Indorsed: No. 6118. Geo. P. Wescott *et al.* vs. Joab Mulvane *et al.* Application of Wm. H. Moulton, Theo. C. Woodbury, & Edward York to be made parties defendant. Filed Feb. 24, 1890. Geo. P. Sharitt, clerk.

STATE OF NEW YORK, } ss:
City & County of New York, }

Theodore C. Woodbury and Walter Stanton, being severally sworn, each for himself, says: The said Theodore C. Woodbury, that he is one of the firm of Woodbury & Moulton, of Portland, Maine; and the said Walter Stanton, that he is one of the firm of Coffin & Stanton, of New York city. And we do further say that in December, 1889, at New York city, we, as representatives — said firms, purchased of Joab Mulvane, of Topeka, Kansas, all the capital stock of the Topeka Water Supply Company, and on the same day paid him $50,000 in cash on account thereof, agreeing to pay the balance upon February 10th, 1890.

It was further provided, that on Jan. 1, 1890, the works should become the property of the purchasers. This purchase was made by us in good faith without any notice of any claim or contract on the part of any one else. And as the owners of the property we have since the said purchase controlled the same.

Inasmuch as the capital stock of the old company was not sufficient to allow of a mortgage for future extensions to the amount deemed by us advisable, we instructed our counsel, Mr. John B. Gleason, of No. 115 Broadway, New York city, to have the proper steps taken to that end, and by his direction a new company was incorporated, known as the Topeka Water Company. An ordinance was obtained from the city of Topeka, authorizing a transfer, and on January 31, 1890, a transfer was made from the old to the new company, and on Feb. 1, 1890, a mortgage of $1,500,000 was executed or delivered to the Atlantic Trust Company of New York, trustee, and was, after being signed by said trust company, sent back to Topeka to the register of deeds to be recorded; all of which acts and many others have been done by us or our direction as owners of the said property, and at considerable cost and expense, relying upon said purchase.

113 The balance of said purchase price was to be paid in New York city, upon February 10, 1890, and the said Woodbury is here from Portland for that purpose, and we are prepared and ready to pay the balance of the purchase price today.

The Atlantic Trust Company of New York was selected by us as trustee, and is ready to certify the bonds. We are advised by telegram that an action has been commenced in Topeka to compel Joab Mulvane to convey the property to other parties. No papers have been served upon us, but as the owners of the property, and being under contract to deliver large quantities of the bonds of the new company to third parties as purchasers, we insist that the temporary injunction said to have been granted, should be vacated.

Subscribed and sworn to before me February 10, 1890.

THEODORE C. WOODBURY.
WALTER STANTON.

In witness whereof, I have hereunto set my hand and [SEAL] affixed my official seal this 10th day of February, A. D. 1890.

CHARLES NETTLETON,
Commissioner for Kansas in New York,
115 & 117 *Broadway, N. Y. City.*

Indorsed: No. 6448. Affidavit of Woodbury & Stanton. Filed Feb. 24, 189–. Geo. F. Sharitt, clerk.

STATE OF MAINE, *Cumberland County,* } ss:

I, Theodore C. Woodbury of Portland, in said county, certify on oath, that I am a citizen of the United States and of the State of Maine, resident at said Portland, and a member of the firm of Woodbury & Moulton, of said Portland, composed of myself and William H. Moulton and Edward H. York; that in December, 1889, representing my said firm, I, with Walter Stanton of the firm of Coffin & Stanton in New York city, and representing his said firm, purchased of Joab Mulvane of Topeka, Kansas, the entire capital stock of the Topeka Water Supply Company of Topeka, Kansas, paying therefor at the time of said purchase fifty thousand dollars of the purchase price and agreeing to pay the balance thereof with interest from and after January 1, 1890, on the tenth day of February, A. D. 1890, which my said firm of Woodbury & Moulton and the said Coffin & Stanton were ready to pay on that day and date, and are still ready to pay the same; that by the terms of said purchase the said two firms, purchasers as aforesaid of said stock, were and are entitled to 111 all the revenue of said company from and after the first day of January, A. D. 1890; that at the time of said purchase I had no acknowledge of any prior sale of said stock by said Mulvane to any other party, person, firm or corporation, or of any claim that any other party has bought said stock or the works of said company; and that said purchase was made by my said firm jointly with said Coffin & Stanton, in good faith.

I, the said William H. Moulton, certify on oath that I am a citizen of the United States and of the State of Maine, resident of said Portland, and a member of the firm of said Woodbury & Moulton; that said Woodbury acted for our said firm in making said purchase jointly with said Coffin & Stanton, and all his doings in that behalf have been and are fully approved by the other members of our said firm, part purchasers as aforesaid; and at the time of said purchase I had no knowledge of any sale of said stock or said company's works having been previously made by said Mulvane to any other party, or parties, or that any person or party claimed to have purchased the same.

I, the said Edward H. York, certify on oath that I am a citizen of the United States and of the State of Maine, resident of said Portland, and a member of the said firm of Woodbury & Moulton; that said Woodbury acted for our said firm in making said purchase

jointly with said Coffin & Stanton, and all his doings in that behalf have been and are fully approved by the other members of our said firm, part purchasers as aforesaid; and at the time of said purchase I had no knowledge of any sale of said stock or said company's works having been previously made by said Mulvane to any other party, or parties or that any person or party claimed to have purchased the same.

THEODORE C. WOODBURY.
WILLIAM H. MOULTON.
EDWARD H. YORK.

UNITED STATES OF AMERICA:

STATE OF MAINE, }
Cumberland, } *ss.*:

FEBRUARY 20, A. D. 1890.

Then personally appeared the above-named Theodore C. Woodbury, William H. Moulton and Edward H. York, all to me well known and known to be the persons they represent themselves to be, and severally made oath to the truth of the foregoing affidavit by them subscribed in my presence.

Before me

[SEAL.] BYRON D. VERRILL,
Notary Public within and for said County and State.

115 STATE OF MAINE, }
Cumberland, } *ss.*:

CLERK'S OFFICE, SUPERIOR COURT,
PORTLAND, *Feb'y 20th*, 1890.

I, B. C. Stone, clerk of all the judicial courts, within and for said county of Cumberland (being courts of record), do hereby certify, that Byron D. Verrill is, and at the date of his certificate to the paper hereto annexed, was an acting notary public, within and for the county of Cumberland, in said State; that he is duly commissioned and qualified to administer oaths, and take acknowledgements of deeds and other instruments in writing, and that the foregoing signature, purporting to be his, is genuine, to the best of my knowledge and belief.

In testimony whereof, I have hereunto set my hand and
[SEAL.] affixed the seal of the said superior court, for said county the day and year first above written.

B. C. STONE, *Clerk.*

Indorsed: No. 6448. Affidavit of Woodbury, Moulton & York. Filed Feb. 24, 1890. Geo. F. Sharitt, clerk.

In the Circuit Court of the United States for the District of Kansas. In Equity.

GEORGE P. WESCOTT and SAMUEL HANSON, Complainants,
vs.
JOAB MULVANE, THE TOPEKA WATER SUPPLY COMPANY, THE Topeka Water Company, William Edward Coffin, Charles Harvey Jackson, Charles Fawcett Street, and Walter Stanton, Partners, Engaged in Business under the Firm Name and Style of Coffin & Stanton, and The Atlantic Trust Company, Defendants.

Now comes the said defendant, Joab Mulvane, by its solicitors, and enters its appearance herein in this suit and to the complainants' bill of complaint filed herein, and we hereby enter our appearance as solicitors for said defendant, Joab Mulvane, herein. Dated this 3d day of March, 1890.

WILLIAMS & DILLON,
EUGENE HAGAN,
HURD & DUNLAP,
J. D. McFARLAND,
Solicitors for said Defendant, Joab Mulvane.

Indorsed: No. 6448. U. S. circuit court. Wescott *et al. vs.* Mulvane *et al.* Entry of appearance of Joab Mulvane, def't. Filed March 3, 1890. Geo. F. Sharitt, clerk.

116 In the Circuit Court of the United States for the District of Kansas. In Equity.

GEORGE P. WESCOTT and SAMUEL HANSON, Complainants,
vs.
JOAB MULVANE, THE TOPEKA WATER SUPPLY COMPANY, THE Topeka Water Company, William Edward Coffin, Charles Harvey Jackson, Charles Fawcett Street, and Walter Stanton, Partners, Engaged in Business under the Firm Name and Style of Coffin & Stanton, and The Atlantic Trust Company, Defendants.

Now comes the said defendant, The Topeka W——, by its solicitors, and enters its appearance herein in this suit, and to the complainants' bill of complaint filed herein, and we hereby enter our appearance as solicitors for said defendant, The Topeka Water Company, herein. Dated this 3rd day of March, 1890.

WILLIAMS & DILLON,
EUGENE HAGAN,
HURD & DUNLAP,
J. D. McFARLAND,
Solicitors for said Defendant.

Indorsed: No. 6448. U. S. circuit court. Wescott *et al. vs.* Mulvane *et al.* Entry of appearance of The Topeka Water Company, def't. Filed March 3, 1890. Geo F. Sharitt, clerk.

In the Circuit Court of the United States for the District of Kansas.
In Equity.

GEORGE P. WESCOTT and SAMUEL HANSON, Complainants,
vs.
JOAB MULVANE, THE TOPEKA WATER SUPPLY COMPANY, THE Topeka Water Company, William Edward Coffin, Charles Harvey Jackson, Charles Fawcett Street, and Walter Stanton, Partners, Engaged in Business under the Firm Name and Style of Coffin & Stanton, and The Atlantic Trust Company, Defendants.

Now comes the said defendant, The Topeka Water Supply Company, by its solicitors, and enters its appearance herein in this suit and to the complainants' bill of complaint filed herein, and we hereby enter our appearance as solicitors for said defendant, The Topeka Water Supply Company, herein. Dated this 3d day of March, 1890.

WILLIAMS & DILLON,
EUGENE HAGAN,
HURD & DUNLAP,
J. D. McFARLAND,
Solicitors for said Defendant, The Topeka Water Supply Company.

117 Indorsed: No. 6448. U. S. circuit court. Wescott *et al. vs.* Mulvane *et al.* Entry of appearance of The Topeka Water Supply Company, def't. Filed March 3, 1890. Geo. F. Sharitt, clerk.

In the Circuit Court of the United States for the District of Kansas.

GEORGE P. WESCOTT and SAMUEL HANSON, Complainants,
against
JOAB MULVANE ET AL., Defendants.

STATE OF NEW YORK, }
City and County of New York, } *ss:*

Walter Stanton, of New York city, being duly sworn, says: I am one of the firm of Coffin & Stanton, bankers, doing business at No. 72 Broadway, New York city. This firm consists of four members, William Edward Coffin, Walter Stanton, Charles H. Jackson and Charles F. Street, all of whom were members of the firm at the times mentioned in this affidavit. All of said persons are citizens of the State of New York and reside in the city of New York.

In December, 1889, Mr. Coffin was absent in Indianapolis, and Mr. Jackson was absent in Europe, and Mr. Street was absent in California: I had authority from my said firm to enter transactions of a character like the transaction with Mr. Joab Mulvane, hereinafter mentioned, and conducted the negotiation with Mr. Mulvane in behalf of said firm, but none of the other members of said firm had any personal knowledge of the transactions at the time when they were

made, and neither I, nor any of said persons, had any knowledge or information or notice that there was any obstacle in the way of our purchasing of Joab Mulvane the capital stock and property of the Topeka Water Supply Company, nor that any contract had been made by him with any one else in regard thereto, and, in particular, we had no knowledge or information that the plaintiffs in this action had or claimed any rights whatever with reference to said capital stock or property, or that they had any contract whatever with Joab Mulvane in regard thereto, and, upon my information and belief, derived from the statements of Theodore C. Woodbury, of Portland, Maine, to me, I allege that neither the said Theodore C. Woodbury, nor any one of the firm of Woodbury & Moulton, of Portland, Maine, had any knowledge or information upon the said subject.

In December, 1889, the firm of Coffin & Stanton, represented by me, and the firm of Woodbury & Moulton, of Portland, Maine,
118 represented by Mr. Theodore C. Woodbury, had agreed with one another that we would purchase the Topeka Water Supply property, if we could do so, and had entered into negotiations with Joab Mulvane with regard thereto. As the result of our negotiations a meeting was had by myself and Mr. Woodbury with Mr. Mulvane, in the city of New York in December, 1889, and, at this meeting, in behalf of our said firms, we purchased of Mr. Mulvane all the capital stock of the Topeka Water Supply Company for the sum of $550,000, and paid to him $50,000, in cash upon the account of such purchase and as portion of the purchase price. The payment of the remaining $500,000 of the purchase price was extended to February 10th, 1890, but, as the owners of the property, we have since the said purchase controlled the same and have in good faith regarded ourselves as the owners of the property, and we made the said purchase and did all the acts hereinafter detailed without any notice of any claim or contract on the part of any one else affecting the said property or any portion thereof, and having no reason whatever to believe or suppose that the plaintiffs in this action had or claimed any interest therein or any cause of action of the nature claimed by them. Regarding the property as our own we have materially changed its condition and have incurred large obligations on account thereof. The capital stock of the old company was not sufficient to allow of a mortgage for future extensions to the amount deemed by us advisable. We accordingly instructed our counsel, Mr. John B. Gleason, of 115 Broadway, to have the proper steps taken so that a mortgage of $1,500,000 could be placed upon the said property, of which amount the sum of $870,000 should be placed in trust, $120,000 to provide for the bonds of the old company, and $750,000 to provide for proper extensions. Under his direction a new company was incorporated in our interest known as the Topeka Water Company with a capital stock of $1,500,000. Application was made to the council of the city of Topeka for leave to transfer the property of the old company to the new company and to continue the contract with the old company in the name of the new company, and, in January, 1890, an ordinance was duly made by the city of Topeka authorizing such transfer upon certain conditions, which were accepted by the new company in our

behalf, and thereupon, and on January 31st, 1890, a conveyance of all the property of the old company was made to the new company, and the new company assumed the duty and obligation of supplying the city of Topeka with water and of carrying out all the formal contracts of the old company. And, in pursuance of proper resolutions, and upon February 1st, 1890, a mortgage of $1,500,000 was executed by the new company and was delivered to the Atlantic Trust Company of New York, as trustee, being the trustee selected by us,
119 and the trustee accepted the said trust and executed the said mortgage and forwarded the same to the register of deeds at Topeka, to be recorded. We also procured the bonds of the new company to be lithographed, and sent the same to the officers of the company, at Topeka, to be signed and executed, in denominations of $1,000 and $500, and, in good faith, believing that we were the owners of the said property and entitled to the said bonds, we recommended the same to different ones of our customers, exhibiting to them copies of the bond and mortgage and of the various papers in connection therewith, as well as the opinion of our counsel upon the validity of the bonds, and, thereupon, sold $220,000 of the said bonds, and the said Woodbury & Moulton sold $100,000 thereof, for immediate delivery after February 10th, 1890, and we procured the residue of the purchase price of said property, $500,000, and now have the same on hand for the purpose of paying the balance of the purchase price. All of the aforesaid steps were taken by us before we had any notice of the plaintiff's claim. We are subjected to great inconvenience and damage by reason of the delay occasioned by the injunction in this action. We insist and demand that the stock purchased by us shall be forthwith delivered to us and that the said bonds shall be delivered to the Atlantic Trust Company, and that we shall be secured in the benefit of our purchase and protected from the claims of the parties to whom we have, in good faith, sold the bonds as aforesaid. We are not willing to surrender any of our rights as the owners of the said property, or under the transfer to us from Joab Mulvane; and we ask that, as innocent purchasers of the said property, we shall be protected in the ownership thereof and shall be allowed forthwith to fulfil the engagements which we have made with reference to the delivery of the bonds.

In addition to our legal rights as owners of the said property, we respectfully insist that our equities in this matter are so much greater than any that the plaintiffs can have, that a court of equity will leave the plaintiffs to their action for damages against Joab Mulvane, if he has made a contract with them for the sale of said property. These equities consist in part of the payments that we have made and the large obligations which we have incurred, as above stated; but still more in the fact that we have in good faith materially changed the condition of the property and have greatly enhanced its value in a commercial point of view, so that, if the plaintiffs obtain the property, they will receive something materially different from what was contemplated by them when their contract was made. In other words, a specific performance cannot be decreed in any event, as it

seems to us, because the identity of the subject-matter has
120 been changed by our act into something much more valuable and to the benefit of which we are entitled. The Topeka Water Supply Company is a corporation of the State of Kansas, originally incorporated with a capital stock of $200,000, subsequently increased to $400,000. The laws of Kansas allow of an increase in the capital stock of a corporation to three times its original amount upon the filing of a certificate, so that the capital stock of the Topeka Water Supply Company could be increased in this way only to $800,000, and, when so increased, could only be mortgaged to the amount of the capital stock. There is already a mortgage of $120,000 upon the property of said company and the stockholders of said company are personally liable for its debts. In our judgment, derived from long experience, it would be impracticable to sell to investors the capital stock of said company at a price which would repay the original outlay to be incurred by the plaintiffs or by us on account of this personal liability of the stockholders, and, unless a mortgage can be issued in an amount sufficient to provide fully for future extensions and improvements the value of a water property is much impaired. In order, therefore, to provide for such a mortgage, as well as for an opportunity to reimburse the purchasers for their purchase, it was necessary to create a new corporation, and this was done by us; but, under the laws of the State of Kansas, it was necessary for the new corporation to have an ordinance from the city of Topeka in order to do business and to succeed to the rights of the former company under its contract with the city of Topeka. By the obtaining of this ordinance we succeeded in making legal a necessary part of the development of the said water works, and which we are advised by our counsel could have in no other way been effected.

If the plaintiffs are successful in this action, instead of acquiring a property with a capital stock of only $400,000, and under the disabilities above mentioned, they will acquire a property with an authorized capital stock of $1,500,000, having a new contract with the city of Topeka and mortgage bonds to the amount of $1,500,000, carefully secured, as will better appear by reference to a copy of the mortgage. The difference in the commercial value of these two properties is very great, and of this enhanced value we ought not to be deprived.

WALTER STANTON.

121 Sworn to before me this 25th day of February, 1890.

In witness whereof I have hereunto set my hand and
[SEAL.] affixed my official seal this 25th day of February, A. D. 1890.

CHARLES NETTLETON,
Notary Public for New York, State of New York,
117 *Broadway, N. Y. City.*

In witness whereof I have hereunto set my hand and
[SEAL.] affixed my official seal this 25th day of February, A. D. 1890.

CHARLES NETTLETON;
Commissioner for Kansas in New York.
115 & 117 *Broadway, N. Y. City.*

In the Circuit Court of the United States for the District of Kansas.

GEORGE P. WESCOTT and SAMUEL HANSON, Complainants,
against
JOAB MULVANE ET AL., Defendants.

STATE OF NEW YORK, }
City and County of New York, } ss:

William Edward Coffin, of New York city, being duly sworn, says: I am one of the firm of Coffin & Stanton, and am the only member of the firm now in New York city except Mr. Walter Stanton; none of the other members of the firm has had any knowledge with reference to the particular matters set forth in the annexed affidavit of Mr. Stanton, to which I refer, but the said Stanton has had full authority from the said firm to transact all the business in the said affidavit referred to. I was absent from New York city when the purchase referred to in the said affidavit was made; I had no knowledge or information as to any claim on the part of the plaintiffs with reference to said property until about the 10th day of February, 1890, when I was informed by telegram from Topeka of the bringing of the present action; all the transactions of our firm in the purchase of said property and as detailed in the affidavit of Mr. Stanton have been made in the belief that we, with the firm of Woodbury & Moulton, were the owners of said property, and in good faith and without any notice or knowledge of the plaintiffs' claim; and I concur in all the allegations of Mr. Stanton's affidavit as to the inconvenience and loss to which we are subjected by the injunction in the present action.

122 There is no partnership relation subsisting between our firm and the firm of Woodbury & Moulton, but each firm is the owner of an undivided interest in the said property and has incurred separate obligations upon account thereof.

WM. EDWARD COFFIN.

Sworn to before me this 25th day of February, 1890.

In witness whereof I have hereunto set my hand and
[SEAL.] affixed my official seal this 25th day of February, A. D. 1890.

CHARLES NETTLETON,
Notary Public for New York, State of New York.
117 *Broadway, N. Y. City.*

In witness whereof I have hereunto set my hand and
[SEAL.] affixed my official seal this 25th day of February, A. D. 1890.

CHARLES NETTLETON,
Commissioner for Kansas in New York,
115 & 117 *Broadway, N. Y. City.*

In the Circuit Court of the United States for the District of Kansas.

GEORGE P. WESCOTT and SAMUEL HANSON, Complainants,
against
JOAB MULVANE ET AL., Defendants.

STATE OF MAINE,
County of Cumberland, City of Portland, } ss.:

Theodore C. Woodbury, of Portland, Maine, being duly sworn, says: I am one of the firm of Woodbury & Moulton, which consists of the following members, to wit: Theodore C. Woodbury, William H. Moulton and Edward H. York, all of whom are citizens of the State of Maine and of the United States of America, residing at Portland, Maine. I refer to the annexed affidavit
B. D. V.
N. P. of Walter Stanton for a statement of the circumstances of the purchase of the Topeka Water Supply Company from Joab Mulvane, and I fully concur in the statements of the said affidavit and adopt them as my own, except so far as they are necessarily personal to Mr. Stanton. I had authority from my firm to enter into transactions of this character, but none of the other members of said firm had any personal knowledge of the transactions at the time when the purchase was made, as the same was effected in New York city, and they were in the State of Maine. I had
123 no knowledge or information whatever that the plaintiffs had or claimed any contract or rights with reference to the Topeka Water Supply Company, and joined in the said purchase in the belief that we might legally and properly make the same, and in good faith and under circumstances similar to those stated by Mr. Stanton with reference to himself and his said firm, and all the subsequent transactions were had by me and by my said firm, relying upon the belief that we were the actual purchasers and owners of the said property and without any knowledge or notice of the plaintiffs' claim in the matter.

I refer to the affidavit of Mr. Stanton for a statement of what was done by us with reference to the property, and adopt and fully concur in all his statements with reference to the same and to the value and importance thereof, and to the injury and injustice which is done to us by the injunction which has been granted in this action.

THEODORE C. WOODBURY.

Sworn to before me this 26th day of February, 1890.
In witness whereof, I have hereunto set my hand and affixed my

official seal this 28th day of February, A. D. 1890, at said
[SEAL.] Portland. I know said Woodbury and that he is the person he represents himself to be.

BYRON D. VERRILL,
Notary Public within and for the County of Cumberland and State of Maine.

STATE OF MAINE, *Cumberland,* } ss:

CLERK'S OFFICE, SUPERIOR COURT.
PORTLAND, *February 26th*, 1890.

I, B. C. Stone, clerk of all the judicial courts within and for said county of Cumberland (being courts of record), do hereby certify that Byron D. Verrill, Esq., is, and at the date of his certificate to the paper hereto annexed, was an acting notary public within and for the county of Cumberland, in said State; that he is duly commissioned and qualified to administer oaths, and take acknowledgements of deeds and other instruments in writing, that I am well acquainted with the handwriting of said notary and verily believe that the foregoing signature purporting to be his is genuine.

In testimony whereof, I have hereunto set my hand and
[SEAL.] affixed the seal of the said superior court for said county, the day and year first above written.

B. C. STONE, *Clerk.*

124 Indorsed: No. 6448. Affidavit of Stanton, Coffin & Woodbury. Filed Mar. 3, 1890. Geo. F. Sharitt, clerk.

Answer of Joab Mulvane, One of the Defendants, to the Bill of Complaint of George P. Wescott and Samuel P. Hanson, Complainants.

In the Circuit Court of the United States for the District of Kansas.
In Equity.

This defendant now, and at all times hereafter, saving and reserving to himself all and all manner of benefit or advantage of exception, or otherwise, that can or may be had or taken to the many errors, uncertainties and imperfections in said bill contained for answer thereto, or to so much or such parts thereof as this defendant is advised it is material or necessary for him to make answer unto, he answers and says:

He admits that prior to the 12th day of November, 1889, The Topeka Water Supply Company, defendant herein, was a corporation organized and existing under and — virtue of the laws of the State of Kansas; that this defendant was the president of said company, that the capital stock of said company was divided into four thousand shares of one hundred dollars each, and that said defendant at that time owned a large number of shares of its capital stock; but the defendant avers that he did not own a majority of the shares thereof; further, this defendant admits that the city of Topeka, by virtue of an ordinance theretofore passed, had granted to said, The Topeka Water Supply Company, the right and privilege of supply-

ing the city of Topeka and the citizens of said city, with water for a period of time in said ordinance named, and the right to extend its pipes throughout any and all of its streets, avenues, alleys and public grounds of said city for the purpose of distributing water, and that prior to said time it had constructed and laid throughout said city a large quantity of pipe for the purpose of distributing water, and also possessed and owned an engine-house, grounds, appliances and wells, and was engaged in distributing and supplying water by means of its said appliances, throughout said city, and that its said plant and property was valuable and its operations profitable.

This defendant further says that some time during the month of October, or early part of November, 1889, the said complainants came to this defendant at the city of Topeka with propositions for the purchase of either the majority or all of the stock of said The Topeka Water Supply Company, but this defendant avers that he did not at that time, nor at any time prior to the 14th day of
125 December, 1889, make said complainants any propositions to sell to them all or any portion of the capital stock of said The Topeka Water Supply Company, and this defendant avers that he did not at that time or afterwards or at any time enter into a contract with said complainants whereby he sold or agreed to sell to said complainants any or all of the stock of said company, but on the contrary this defendant avers that at said time, at said city of Topeka, he refused to entertain any of the propositions made by said complainants for the purchase of all or a part of the stock of said company, and declined at that time to make or enter into a contract with respect to the same.

This defendant further says that he admits that he afterward wrote the letters mentioned in said bill of complaint, and that pursuant to the arrangements thereby made, he met said complainants in the city of Boston, on or about the 14th day of December, 1889, and then entered into negotiations with said complainants respecting the sale of the entire capital stock of the said The Topeka Water Supply Company.

Defendant further says that during said negotiations he told said complainants that he was not the owner of all the said stock of said corporation, and did not know how long it would take him to get all of said stock; that he had only with him there about 390 shares of said stock; that he was willing to enter into a contract with them for the sale of all of said stock, provided a sufficiently large sum was paid down in cash to insure him of their good faith and ability as proposed purchasers and that they would carry out their contract and he could have sufficient time to obtain control of the balance of the stock of said company which he did not then have. That after considerable talk, and late in the afternoon of the said 14th day of December, 1889, this defendant made said complainants a proposition to sell to them all of the capital stock of said company, which proposition one of the complainants, at his own instance, wrote down, in substance, as is set out in said complainants' bill, and asked this defendant to sign it, which he did, and thereupon one of said com-

plainants wrote an acceptance of the same, and said defendants signed said acceptance in substance as set forth in said bill of complaint. But this defendant avers that at the time he made the said proposition it was understood and agreed that said complainants and this defendant should meet on the following Monday and agree upon and execute a contract for the sale of said stock, which said contract was to embody all the necessary details not then agreed upon, which said contract the said Hanson agreed to block out, and meet
126 this defendant on the following Monday, at which time they were to agree upon a contract for the sale of said property, if they could so agree, and enter into a valid and binding contract with respect to the same.

This defendant further says that said proposition and acceptance was only of the nature of preliminary negotiation, and was not to be, and was not intended to be or become of binding effect unless a definite and complete contract embodying all the necessary details and terms of said sale should be agreed upon and entered into between said parties upon said Monday.

Defendant further says that at the time said negotiations of December 14th were had, it was not contemplated that this defendant should immediately deliver or place in the bank said shares of stock; such immediate delivery being and being known to said complainants to be an impossibility; that prior to the making or signing of said proposition this defendant had told said complainants that they must rely upon his personal responsibility to carry out a contract upon his part, if one was made, and there was no agreement or understanding as to when said shares of stock should be placed in the bank, but it was understood that it was impossible for this defendant to place all of said shares there at once, and not for some time thereafter.

This defendant further says that on the Monday following said 14th day of December, 1889, he again met said complainants, who then presented him for his signature a form of contract, a copy of which is hereto attached, marked Exhibit "A;" that said defendant declined to sign said contract for the reason that it was at variance with his proposition, and because it required him to at once place said shares of stock in the bank, which he could not do, and which it was the agreement and understanding upon the previous Saturday that he was not to be required to do; that said complainants refused to accept or enter into any contract except a contract which would require this defendant to immediately place said shares of stock in said bank; that said complainants did not at said time, or afterwards or at any time tender or offer to pay this defendant the sixty thousand dollars mentioned in said proposition, or any part thereof; that after said complainants had refused to enter into a contract, except a contract requiring this defendant to immediately place said shares of stock in the bank, this defendant notified said complainants that he withdrew all of his propositions for the sale of said stock that he had heretofore made, and declined to negotiate further upon the basis of said propositions.

127 This defendant further says that neither of said complainants, nor no one of them have since said time or at any time, offered to make any contract with this defendant for the purchase of said shares of stock, or tendered this defendant any money as part payment therefor, unless said contract was tendered by Mr. C. R. Smith, one of the complainants' solicitors, which said tender, if any was made to this defendant, was made by Mr. Smith offering this defendant a paper about the time of the serving of the restraining order in this suit, which paper said Mr. Smith asked this defendant to sign, but this defendant does not know the contents of said paper and refused to examine or sign the same.

This defendant further avers that at all times during the pendency of said negotiations and up until the time he notified said complainants that he withdrew his propositions for the sale of said stock, he was ready and willing to sell said stock to said complainants at the price and upon the terms of payment provided in said proposition, and was ready and willing and would have carried out and complied with the spirit and intention of the negotiations of said 14th day of December, had said complainants also been willing to do the same, and this defendant was ready and willing prior to the time that he notified said complainants that he withdrew his propositions, to enter into a valid contract in writing with said complainants for the sale of said stock, in accordance with the understanding of the parties had on said 14th day of December.

This defendant further says that at the time said negotiations were had with said complainants in the city of Boston, he did not own and control all of the capital stock of said Topeka Water Supply Company, which fact was well known to said complainants, and this defendant then had with him only 390 shares of said stock; that when said negotiations were being had on said 14th day of December, it was the understanding that this defendant was not to be required to deliver any of said stock unto said complainants until they had placed in the bank money sufficient to pay for all of said stock; that it was the understanding that said complainants should pay to this defendant sixty thousand dollars when the contract should be entered into, and that they should rely upon the personal responsibility of this defendant for the performance of the contract upon his part; that said complainants on the Monday following refused to enter into a contract except a contract requiring this defendant to at once place in said bank all of the stock of said Topeka Water Supply Company; that this defendant avers that said negotiations did not and never did result in any definite contract respecting the

128 sale of said stock; that no completed contract, valid and binding upon either of said parties, was made or entered into between this defendant and said complainants respecting the sale of said stock; that said complainants on the 16th day of December, 1889, refused to enter into a contract such as had been contemplated by the parties during their negotiations on said December 14th, and refused to enter into any contract except one at variance with the understanding of said parties on said last day named.

This defendant further says that afterwards and after he had de-

clared the negotiations with said complainants off, and notified them that he withdrew his propositions and would not negotiate further with them, and on the 18th day of December, 1889, at the city of New York, in the State of New York, he sold to Edward Coffin, Walter Stanton, Charles Harvey Jackson and Charles Faucett Street, partners under the firm name of Coffin & Stanton, defendants herein, and to William H. Moulten, Theo. C. Woodbury and Edward H. York, partners under the firm name of Woodbury & Moulton, jointly all of the capital stock of said The Topeka Water Supply Company; that as this defendant is informed and believes and charges the fact to be, the aforesaid two firms were not and are not partners in the purchase and ownership of said stock, but were and are joint purchasers and owners thereof; that each of said firms purchased an undivided interest in said stock; the said firm of Coffin & Stanton purchasing and owning an undivided interest therein, and said firm of Woodbury & Moulton purchasing and owning the other and remaining undivided interest therein.

And this defendant is informed and believes and charges the fact to be that neither of the aforesaid purchasers of said stock at any time prior to the purchase thereof, as aforesaid, had any notice or knowledge of the pretended claims of said complainants as set up in their bill of complaint, but on the contrary, said purchasers purchased said stock in good faith and for a valuable consideration, and did on the 18th day of December, 1889, pay to this defendant fifty thousand dollars as part of the purchase-money of said stock, and entered into an agreement to pay this defendant the further sum of five hundred thousand dollars on the 10th day of February, 1890, at which time said stock was to be delivered to said firm of Coffin & Stanton and said firm of Woodbury & Moulton, as joint owners of the same; that by said purchase on said 18th day of December, said Coffin & Stanton and said Woodbury & Moulton jointly became the owners of all of said capital stock of said Topeka Water Supply Company, and entitled to the possession thereof on the
129 payment of the balance of the purchase-money as then agreed, and this defendant is informed and believes and so charges the fact to be, that on the said 10th day of February, that Coffin & Stanton and said Woodbury & Moulton, were ready to pay said balance of said purchase-money, in accordance with said contract, and would have done so, and this defendant would have delivered to them the certificates of said shares of stock, had it not been for the issuing of the temporary restraining order and injunction issued herein. Defendant further says that according to the terms of the sale of said stock, the said Coffin & Stanton and said Woodbury & Moulton, were on and after the first of January, 1890, entitled to the incomes and profits of said water works, and that since said first day of January, 1890, said water works have been managed, operated and controlled in the interest of and for the benefit of said Coffin & Stanton and said Woodbury & Moulton, and all the incomes and profits accounted for to them.

This defendant further says that said Woodbury & Moulton and said Coffin & Stanton, deemed it desirable that the franchises and

property of said Topeka Water Supply Company should be transferred to and placed in the possession of a corporation with a greater capital stock than provided for by the charter of the Topeka Water Supply Company, and accordingly this defendant, at the suggestion of said Coffin & Stanton and said Woodbury & Moulton, and for their benefit procured the Topeka Water Company to be organized, and thereafter the city council of the city of Topeka passed an ordinance authorizing the conveyance to said The Topeka Water Company of the privileges and franchises granted to the Topeka Water Supply Company by ordinance of said city of Topeka, and in accordance with the terms thereof a conveyance was duly made and duly executed by said Topeka Water Supppply Company of its property and franchises unto said The Topeka Water Company, and which was duly delivered, and a copy thereof together with the acceptance of said ordinance filed in the clerk's office of the city as required by the terms of said ordinance; all of which was done prior to the commencement of this suit; and this defendant says that he has no interest in the Topeka Water Company, but assisted in the organization thereof and in procuring the passage of said ordinance for the benefit and at the request of said Coffin & Stanton and said Woodbury & Moulton, the purchasers of said stock as hereinbefore stated.

This defendant further says that after the organization of said The Topeka Water Company, said company executed its first mortgage to secure the payment of its first-mortgage bonds to the
130 amount of one million five hundred thousand dollars upon all the property and franchises so as aforesaid conveyed to it, which said mortgage was delivered to the Atlantic Trust Company, a corporation duly organized and existing in the State of New York, and a citizen of the State of New York, as trustee; that said The Topeka Water Company also executed five hundred thousand dollars of the said first-mortgage bonds and was ready to deliver the same to said Atlantic Trust Company as such trustee, which trustee was ready to certify and deliver to the parties who had agreed to purchase the same; and the same would have been so delivered had not such delivery been prevented by the temporary restraining order and injunction issued in this suit.

This defendant further says that he is informed, and believes and charges the fact to be that the said Edward Coffin, Walter Stanton, Charles Harvey Jackson and Charles Faucett Street, and each of them, are citizens and residents of the State of New York, and that said William H. Moulton, Theo. C. Woodbury and Edward H. York are each residents of the city of Portland, in the State of Maine, and are each citizens of said State of Maine, and were such citizens at and before the institution of this suit, and that parties last herein named are necessary and indispensable parties to this suit.

Further answering, this defendant says that he declined to go on with said negotiations had with said complainants in the city of Boston, and withdrew his propositions made to them and declared the transactions off, because he believed said complainants were not acting in good faith and were attempting to induce him to make a

contract that would bind him, but would not bind them, and because he believed said complainants did not intend to pay him the sixty thousand dollars to be paid upon the consummation of the contract; and this defendant says he is informed and believes and charges the fact to be that said complainant, Samuel Hanson, has no property or means of any considerable amount, and that said complainant, George P. Wescott, is not possessed of means or property sufficient to make him pecuniary responsible to anywhere near the sum at which this defendant had proposed to sell said stock; that said complainants did not at any time during said negotiations disclose to this defendant who their associates were, if they had any, in said transaction.

This defendant, in addition to the foregoing answer, submits to the court whether or not said complainant is, by reason of the matters and things in said bill contained, entitled to any relief as against this defendant, and he claims the same benefit by reason thereof and in like manner, as if he had demurred to said bill for want of equity. Further, this defendantt says that said Edward
131 Coffin, Walter Stanton, Charles Harvey Jackson and Charles Faucett Street, partners as Coffin & Stanton, and said Atlantic Trust Company, although made parties to the bill, have not been served with subpœnas, and that said William H. Moulton, Theo. C. Woodbury and Edward H. York, partners as Woodbury & Moulton, are not made parties to complainants' bill, and this defendant submits whether or not said parties or some of them are not necessary and indispensable parties defendant to said bill, and claims the same benefit and advantage by reason of any defect in said bill for want of parties in like manner as if he had pleaded the same. And this defendant denies all and all manner of unlawful combinations and fraud charged against him in said bill; and, further answering, this defendant denies all and every the matter and things in said bill contained, material and necessary for this defendant to answer unto and not hereinbefore well and sufficiently answered unto, confessed or avoided, traversed or denied; all which matters and things this defendant is ready and willing to aver, maintain and prove as this honorable court may direct, and humbly prays to be hence dismissed with his reasonable costs and charges in that behalf most wrongfully sustained.

JOAB MULVANE, *Defendant.*
WILLIAMS & DILLON,
EUGENE HAGAN,
HURD & DUNLAP,
J. D. McFARLAND,
Solicitors for said Defendant, Joab Mulvane.

UNITED STATES OF AMERICA,)
State and District of Kansas, County of Shawnee,) ss:

On this first day of March, 1890, before me the undersigned, personally appeared the above-named Joab Mulvane, and made oath that he has read the foregoing answer subscribed by him and knows

the contents thereof, and that the facts therein stated, so far as they are stated of his own knowledge, are true, and so far as they are stated on information and belief he believes them to be true.

Witness my hand and official seal the day and year last above written.

[SEAL.]

ELIAS SHULL,
Notary Public, Shawnee Co., Kas.

Term ends March 17, 1892.

EXHIBIT A.

The Brunswick—Barnes & Dunklee, Boston.

132 Agreement made & entered into this 14" day of December, 1889, between Joab Mulvane, of Topeka, Kansas, party of the first part, and Geo. P. Wescott, of Portland, Maine, and Samuel Hanson, of Boston, Mass., party of the second part.

The said party of the first part hereby sells and agrees to have properly assigned, transferred & delivered to said party of the second part, upon terms of payment hereinafter named, the entire capital stock of the Topeka Water Supply Company, of Topeka, Kansas, which consists of four thousand shares of the par value of one hundred dollars each, for the sum of five hundred thousand dollars. The party of the second part hereby purchases and agrees to pay for said four thousand shares of Topeka Water Supply stock as follows: Sixty thousand dollars on signing this agreement; two hundred thousand dollars on the 10th February, 1890; one hundred & forty thousand dollars on the 20th day of February, 1890, and the further sum of one hundred thousand dollars on the 20th day of February, 1890, unless said party of the second part elect to pay said one hundred thousand dollars on the 20th day of March, 1890, which they may do on giving notice of such intention to the party of the first part five days prior to said 20th Feb'y. The party of the first part also agrees to at once place in the hands of the cashier of the National Bank of North America, in the city of Boston, Mass. the certificates representing the entire capital stock of the Topeka Water Supply Company, before named, which certificates shall be indorsed
transferred in blank. It being the intention of this agreement that the said stock shall be delivered & paid for at the said National Bank of North America. The party of the second part also agrees to pay to the party of the first part interest from the first day of January, 1890, at the rate of six per cent. per annum on the sums amounting to four hundred & forty thousand dollars, until the date on which said sums are paid to the party of the first part. In consideration for which the party of the first part hereby agrees [(that the party of the second part shall receive all monies or income from any source to which the Topeka Water Supply Company may be entitled
and
from the first day of January, 1890,)]* that said corporation shall

[* Words and figures enclosed in brackets erased in copy.]

after full pay-
be turned over to said party of the second part (on the first day ment for said stock
of Jan'y, 1890), free from all debts & encumbrances of every kind, except the funded debt, consisting of one hundred & twenty thousand first-mortgage bonds.

Indorsed: No. 6448. U. S. circuit court. George P. Wescott & Samuel Hanson, plaintiff-, *vs.* Joab Mulvane *et al.*, defendant-.
133 Answer of Joab Mulvane. Filed Mar. 3, 1890. Geo. F. Sharitt, clerk. Williams & Dillon, E. Hagan, Hurd & Dunlap, J. D. McFarland, sol's for def't-, Topeka, Kansas.

Plea of The Topeka Water Company to the Bill of Complaint of George P. Wescott and Samuel Hanson, Complainants.

In the Circuit Court of the United States for the District of Kansas.

GEORGE P. WESCOTT and SAMUEL HANSON, Complainants,
vs.
JOAB MULVANE, THE TOPEKA WATER SUPPLY COMPANY, THE Topeka Water Company, Edward Coffin, Walter Stanton, Charles Harvey Jackson, and Charles Faucett Street, Engaged in Business under the Firm Name of Coffin & Stanton, and The Atlantic Trust Company, Defendants.

This defendant, by protestation, not confessing or acknowledging any of the matter- and things in and by said bill set forth and alleged to be true in manner and form as the same are thereby and therein set forth and alleged, for plea to the whole of said bill, says that heretofore, to wit, on the 18th day of December, 1889, and before the commencement of this suit, William H. Moulton, Theo. C. Woodbury and Edward H. York, partners under the firm name of Woodbury & Moulton, together with the above-named defendants, Coffin & Stanton, partners as above stated, jointly purchased all of the capital stock of said The Topeka Water Supply Company, mentioned in said bill, from the above-named defendant, Joab Mulvane, and did, upon the 18th day of December, 1889, pay to said Joab Mulvane, as part of the purchase-money thereof, the sum of fifty thousand dollars, and that in pursuance of the terms and conditions of said sale, the said firms of Coffin & Stanton and Woodbury & Moulton were to pay to the said Joab Mulvane the further sum of five hundred thousand dollars on the 10th day of February, 1890; that by the terms of said sale said Coffin & Stanton and said Woodbury & Moulton jointly became the owners of all of said capital stock of said Topeka Water Supply Company and entitled to the possession thereof on the payment of the balance of the purchase-money as then agreed. That upon said payment of all of said purchase-money, said stock was to be delivered to the said firms of Coffin & Stanton and Woodbury & Moulton; said firm of Woodbury & Moulton to own an undivided interest in said stock, and said firm of Coffin & Stanton to own the other remaining undivided interest in

said capital stock; that further, by the terms and conditions
134 of said sale and contract, the said purchasers were entitled to the incomes and profits on the water works after the first day of January, 1890, and that since said first day of January, 1890, said water works have been managed, operated and controlled for the benefit of said purchasers, and all incomes and profits accounted for to them.

This defendant therefore submits that said William H. Moulton, Theo. C. Woodbury and Edward H. York are necessary and indispensable parties to this suit, and ought to be, but are not, made parties to said bill. All which matters and things this defendant avers to be true, and it pleads the said matters and things to said complainant's bill, and prays the judgement of this honorable court as to whether it should be compelled to make further and other answer to said bill, and prays to be hence dismissed, with its costs and charges in that behalf most wrongfully sustained.

WILLIAMS & DILLON,
EUGENE HAGAN,
HURD & DUNLAP,
J. D. McFARLAND,
Solicitors for Defendant The Topeka Water Company.

We, A. A. Hurd & J. D. McFarland, counsel for The Topeka Water Company, one of the above-named defendants, certify that, in *my* opinion, the above and foregoing plea is well founded in point of law.

A. A. HURD,
J. D. McFARLAND, *Counsel.*

UNITED STATES OF AMERICA, }
State of Kansas, County of Shawnee, } *ss:*

Joab Mulvane, of lawful age, being first duly sworn, on oath deposes and says, that he is president of the Topeka Water Company, and that he has read the foregoing plea, and that the matters and things set out in said plea are true in point of fact, and further saith not.

JOAB MULVANE.

Sworn to before me and subscribed in my presence this first day of March, A. D. 1890.

[SEAL.] ELIAS SHULL,
Notary Public, Shawnee Co., Kas.

Term ends March 17, 1892.

135 Indorsed: No. 6148. U. S. circuit court. George P. Wescott & Samuel Hanson, plaintiff-, *vs.* Joab Mulvane *et al.*, defendant-. Plea of the Topeka Water Company. Filed Mar. 3, 1890. Geo. F. Sharitt, clerk. Williams & Dillon, E. Hagan, Hurd & Dunlap, J. D. McFarland, sol'rs for def't-, Topeka, Kansas.

In the Circuit Court of the United States for the District of Kansas.

Answer of The Topeka Water Supply Company, one of the defendants, to the bill of complaint of George P. Wescott and Samuel Hanson, complainants.

This defendant now, and at all times hereafter, saving and reserving to itself all and all manner of benefit or advantage of exception, or otherwise, that can or may be had or taken to the many errors, uncertainties and imperfections in said bill contained for answer thereto, or to so much and such parts thereof as this defendant is advised it is material or necessary for it to make answer thereunto, it answers and says:

This defendant admits that, prior to the 12th day of November, 1889, it was a corporation, duly organized and existing under and by virtue of the laws of the State of Kansas, and avers that it still is and exists as such a corporation; further, defendant admits that the city of Topeka, by virtue of an ordinance theretofore passed, had granted to this defendant the right and privilege of supplying the city of Topeka and the citizens of said city with water, for a period of time in said ordinance named, and the right to extend its pipes throughout any and all streets, avenues, alleys and public grounds of said city, for the purpose of distributing water, and that prior to said time it had constructed and laid throughout said city a large quantity of pipe for the purpose of distributing water, and also possessed and owned an engine-house grounds, appliances and wells, and was engaged in supplying water, by means of its said appliances, throughout said city, and that its said plant and property was valuable, and its operation profitable; further, defendant avers, that it continued to own and possess said property up to and until the time it conveyed the same to the Topeka Water Company, as hereinafter stated.

This defendant further says, that it has no knowledge respecting the transactions alleged in said bill to have taken place between said complainants and said defendant, Joab Mulvane; but it is informed and believes and therefore charges the fact to be that said complainants and said Mulvane never entered into any valid and binding contract with respect to the sale of said stock by said Mulvane
136 to said complainants; that if said complainants and said Mulvane ever had any negotiations looking to the formation of a contract for the sale of said stock, the said complainants, before said contract was consummated, refused to enter into any contract with said Mulvane of the nature and character contemplated by said parties during said negotiations, and that in consequence thereof the said Mulvane notified the said complainants that he withdrew his propositions that he had made them respecting the sale of said stock, and that he would go no further with said negotiations.

This defendant further avers, that it is informed and believes, and therefore charges the fact to be, that after the said Joab Mulvane had withdrawn his propositions made to said complainants respecting the sale of said stock, and notified said complainants thereof, said

Joab Mulvane did, on the 18th day of December, 1889, and prior to the commencement of this suit, sell all of the capital stock of this defendant to Edward Coffin, Walter Stanton, Charles Harvey Jackson and Charles Faucett Street, partners under the firm name of Coffin and Stanton, defendants herein, and William P. Moulton, Theo. C. Woodbury and Edward H. York, partners under the firm name of Woodbury & Moulton; that said two firms were not and are not partners in the purchase and ownership of said stock, but were and are joint purchasers and owners thereof, each of said firms purchasing and owning an undivided interest in said shares of stock; that neither of the aforesaid purchasers at any time prior to the purchase of said stock had any notice or knowledge of the pretended claims of said complainants set up in their bill of complaint, but purchased said stock in good faith for a valuable consideration, and did, on the 18th day of December, 1889, pay to said defendant, Mulvane, fifty thousand dollars as part of the purchase-money of said stock, and entered into an agreement to pay this defendant the further sum of five hundred thousand dollars on the 10th day of February, 1890, at which time said stock was to be delivered to the said firm of Coffin & Stanton and the said firm of Woodbury & Moulton, as joint owners of the same; that by said purchase on said 18th day of December, 1889, said Coffin & Stanton and said Woodbury & Moulton jointly became the owners of all of said capital stock of this defendant, and entitled to the possession thereof on the payment of the balance of the purchase-money as then agreed; that by the terms of said sale of said stock the said Coffin & Stanton and said Woodbury & Moulton were on the first day of January, 1890, entitled to the incomes and profits of said water works, and that since said first day of January, 1890, said water works has been managed, operated and controlled in the interest of and for the benefit of said Coffin & Stanton and said Woodbury & Moulton, and all incomes and profits accounted for to them; that said Woodbury &
137 Moulton and said Coffin & Stanton, purchasers of said stock, and the said defendant, Joab Mulvane, were on the 10th day of February, 1890, and still are, willing and desirous to deliver said stock and pay said purchase-money and close up said sale in accordance with the terms thereof, and would have done so on the 10th day of February, 1890, had they not been prevented by said temporary restraining order and injunction issued herein; but that said purchasers insisted and are insisting upon their rights under and by virtue of said sale and the closing up of said matter as soon as the same can be done.

That said Woodbury & Moulton and said Coffin & Stanton deemed it desirable that the franchises and property of this defendant should be transferred to and placed in the possession of a corporation with a greater capital stock than provided for by the charter of this defendant, and accordingly at the request and suggestion of said Coffin & Stanton and said Woodbury & Moulton and for their benefit, the Topeka Water Company was organized, and thereafter the city council of the city of Topeka passed an ordinance authorizing the conveyance to said The Topeka Water Company of all

the privileges and franchises granted to this defendant by ordinance of said city, and in accordance with the terms thereof a conveyance was made and duly executed by this defendant of all its property and franchises to said The Topeka Water Company, which was duly delivered, and a copy thereof, together with the acceptance of said ordinance, filed in the clerk's office of the city of Topeka, as required by the terms of said ordinance, all of which was done prior to the commencement of this suit; this defendant says he is informed and believes, and therefore charges the fact to be, that after the organization of said The Topeka Water Company, said company executed its first mortgage to secure the payment of its first-mortgage bonds to the amount of one million five hundred thousand dollars upon all the property and franchises so as aforesaid conveyed to it; which said mortgage was delivered to the Atlantic Trust Company, a corporation duly organized and existing in the State of New York, and a citizen of the State of New York, as trustee; that said The Topeka Water Company also executed five hundred thousand dollars of said first-mortgage bonds, and was ready to deliver the same to the said Atlantic Trust Company as such trustee, which trustee was ready to certify and deliver to the parties who had agreed to purchase the same, and the same would have been so delivered had not said delivery been prevented by the temporary injunction and restraining order issued in this suit; that this defendant is informed and believes and charges the fact to be, that said Edward Coffin, Walter Stanton, Charles Harvey Jackson and Charles Fawcett Street,
138 and each of them, are citizens and residents of the State of New York; that said William H. Moulton, Theo. C. Woodbury and Edward York are each residents of the city of Portland, and are each citizens of the State of Maine, and were such citizens at and before the time of the commencement of this suit, and that said parties last named herein are necessary and indispensable parties to this suit.

This defendant, in addition to the foregoing answer, submits whether or not the said complainant is, by reason of the matters and things in said bill contained, entitled to any relief as against this defendant, and claims the same benefit by reason thereof and in like manner as if it had demurred to the said bill for want of equity.

Further, this defendant says that said Edward Coffin, Walter Stanton, Charles Harvey Jackson and Charles Fawcett Street, partners as Coffin & Stanton, and said Atlantic Trust Company, although made parties to this bill, had not been served with subpœnas, and that said William H. Moulton, Theo. C. Woodbury and Edward York, partners as Woodbury & Moulton, were not made parties to the bill of complaint, and this defendant submits whether or not said parties, or some of them, are not necessary and indispensable parties to said bill, and claims the same benefit and advantage by reason of any defect in said bill for want of parties, in like manner as if it had pleaded to the same.

Further, this defendant denies all and all manner of unlawful combinations and fraud charged against it in said bill, and further

answering, denies all and every the matters and things in said bill contained material and necessary for it to make answer unto and not hereinbefore well and sufficiently answered unto, confessed or avoided, traversed or denied.

All of which matters and things this defendant is ready — willing to aver, maintain and prove as this honorable court may direct, and humbly prays to be hence dismissed with *his* reasonable costs and charges in this behalf most wrongfully sustained.

WILLIAMS & DILLON,
EUGENE HAGAN,
HURD & DUNLAP,
J. D. McFARLAND,
Solicitors for Defendant The Topeka Water Supply Company.

Indorsed: No. 6148. U. S. circuit court. George P. Wescott & Samuel Hanson, plaintiffs, *vs.* Joab Mulvane *et al.*, defendants. Answer of the Topeka Water Supply Company. Filed Mar. 3, 1890. Geo. W. Sharitt, clerk. Williams & Dillon, Eugene Hagan, Hurd & Dunlap, J. D. McFarland, sol'rs for def't, Topeka, Kansas.

139 *Opinion.*

In the Circuit Court of the United States for the District of Kansas.

GEORGE P. WESCOTT and SAMUEL HANSON, Complainants,
vs.
JOAB MULVANE ET AL., Defendants.

THE COURT: I cannot say that I intend now to pass upon what would be the effect upon the jurisdiction of this court if these parties were allowed to come in as parties and set up their rights and interest in the subject-matter of this controversy. But if I should require the complainants to bring them in, as parties defendant to their bill, and it should be made to appear to the court that they were citizens of the same State as the complainants, then the jurisdiction of this court is at an end. I suppose there can be no controversy upon that question; that is, assuming that they are necessary parties, and of course I would not make an order unless they were necessary parties.

The question as to the jurisdiction of this court which would be presented by these parties coming in as intervenors—not as parties defendant to the bill, but as intervenors—interested in the subject-matter of the controversy, and setting up their rights in a cross-bill, is another question. I am not fully prepared to say whether it would oust the jurisdiction of the court or not. There might be a separable controversy still in the case, an independent controversy, between citizens of different States, which possibly might confer jurisdiction upon this court to determine. But that the practice for parties who seek to come into a case like this, is for them to come in as intervenors and set up their rights by bill in the nature of a cross

bill, when they disclose an interest on their own motion, I do not have any doubt. If it should appear from the face of the complainants' bill that they had omitted an indispensable party, or necessary party, then the court would require the complainants to bring the party into court or would not entertain the bill. But where this information comes from an outside party, a third party, setting up an interest in the subject-matter of the controversy, that is quite a different question.

There are only two ways for these parties to come in: either to be made parties defendant in this bill or intervene. That is apparent, because, otherwise, if they should come in and seek to set up their interest in an answer without having been made parties to the bill, how are the issues to be made up? In the equity practice, no special replications are allowed; it can be only a general replication. So, you see, as indicated by Chancellor Cooper, it is impossible to make up the issues unless they are brought in as parties defendant to the bill, or come in independently and set up their rights by cross-bill.

I am satisfied the proper practice in a case of this kind, where it is not disclosed on the face of the bill that there are other parties indispensable or necessary, is to permit the parties to intervene and come in and set up their interest in the subject-matter.

Now, so much having been determined, that practically disposes of this motion, if I understand it, and I will have to overrule this application in the shape in which it comes up. However, I will say, if it is arranged in the shape of an application to file a cross-bill, I will entertain the application; but that possibly might hinge upon the question that would arise as to the jurisdiction of the court. Then, under the 47th rule, it would be discretionary with the court, even if they were necessary parties, to proceed without their presence, saving their rights. But as the rule suggests, this question can be presented to the court when the time arrives, and there is time enough when the question is presented.

The motion to make the parties defendant, as it is made here, is overruled.

Indorsed: No. 6448. Opinion. Filed Mar. 3, 1890. Geo. F. Sharitt, clerk.

UNITED STATES OF AMERICA, *District of Kansas*, } ss:

At a term of the circuit court of the United States of America, for the district of Kansas, begun and held at the city of Topeka, in said district, Monday, the 25th day of November, 1889, proceedings were had, and appear of record, in words and figures following, to wit:

MONDAY, *March* 3, 1890.

GEO. P. WESCOTT ET AL. vs. JOAB MULVANE ET AL. } 6448.

Now comes said complainants by Rossington, Smith & Dallas, their solicitors, and thereupon comes on for hearing the application filed by Wm. H. Moulton, Theo. C. Woodbury and Edward York, partners as Woodbury & Moulton, to be made parties defendant in the above-entitled suit, the said Woodbury & Moulton appearing, — Williams & Dillon, Hurd & Dunlap, J. D. McFarland and Eugene Hagan,
141 their solicitors, and upon affidavits being read by the said Woodbury & Moulton and upon arguments of counsel, said application is submitted to the court, and the same being fully considered by the court, said application is denied.

Opinion.

In the Circuit Court of the United States for the District of Kansas.

GEORGE P. WESCOTT and SAMUEL HANSON, Complainants, vs. JOAB MULVANE ET AL., Defendants. }

THE COURT: I do not think that this court is bound to anticipate that some other person is a necessary party unless they come in and assert it. Here is the property within the jurisdiction of this court; the parties cannot resort to any other tribunal to stop the transfer, and this court could not consider the anticipation or possibility of some citizen in another State having some interest.

There is, however, a difficult question involved in this case. It is very much in anticipation after all, and that is the one I have suggested. You have discussed this on its various bearings and have discussed it fully.

Perhaps I should say that in a question of this kind we do not sit to determine the ultimate rights of the different parties, upon a hearing for a temporary injunction, or to determine close questions of law or fact. We cannot do it upon a summary hearing such as is usual in an application for a temporary injunction. We have to determine, however, whether the complainants in this case have what appears to be a contract; that is something *prima facia* showing a contract for the sale of this stock and franchise. If this is not a contract, then, of course, the complainants have no remedy either in law or equity for a claim for breach of the contract. That is the end of the case, in whatever tribunal it is brought, whether in law or equity.

Of course, I am not now deciding what may require a further examination or more careful examination in the future; but I am impressed with the conviction that this agreement between these parties contains all the essential elements of a contract. The proposition is made by the vendor to sell this property upon certain terms,

payments to be made at specific times, in specific amounts and at a certain place named. It is true, they say, that there is to be
142 a further contract made, a more definite contract made, and yet it seems to me that the written contract presented here contains all the essential elements of a contract between the parties, for a breach of which either party would have a remedy somewhere, either in law or equity. I am aware of the rule established and well settled in the law that where anything essential remains to be done and determined that the contract is not consummated and perfected. The other rule is equally true, if a contract contains all the essential elements necessary to constitute a complete contract, it is good, whether carried out more minutely in a subsequent contract or not. The contract in writing, so far as it goes, is presumed to embody all the understandings between the parties.

There has been some talk here about Mr. Mulvane saying, "You must trust me to take this money and rely upon my personal responsibility." The writing does not say so. The writing says the money is to be paid at a certain bank and the stock is to be delivered there. Now, it seems to me that a fair inference between business men, under a stipulation of that kind, would be that that bank was to be the custodian, or the bailee, of the money on the one hand and of the stock on the other. That is the way it would impress the casual observer in reading that over. That did not look as if it was entirely the intention of these parties to just take Mr. Mulvane's word. Neither was it obligatory upon the vendees to keep trying and trying to fix up a contract to suit Mr. Mulvane. Mr. Mulvane was bound, in equity, to be frank and fair with these people. He had no right to resort to any subterfuge to get out of his contract. He could not sit by and say "That will not suit me" and "This will not suit me." That will not be permitted; he has got to act in a spirit of fairness and candor and frankness, and endeavor, in good faith, to reach a complete understanding as to all the minutia as to how this contract was to be carried out. I am not impressed, from the evidence in this case, that Mr. Mulvane did that. But, as I said before, I think that the written contract fairly embodies all that is necessary to make it binding upon the parties.

The next question is whether these parties have a right to come into a court of equity and ask for a decree of specific performance. You gentlemen do not disagree very much as to what the law is on that question. In the case of a contract for the sale of goods or chattels, or the stock of corporations which can be purchased in the open market, the rule seems to be well settled, both in this country and in England, that the parties must resort to their action at law for damages; but where, by reason of the peculiar nature of the property sold, the parties cannot have a complete and adequate remedy at law, then quite often, in the discretion of the courts of chancery, they will decree a specific performance of the contract.

143 The stock of this corporation in controversy was not known on the stock markets; it had no value that could be quoted; the parties could *could* not go into the open market and buy any of this

property. So that this case does not come within that well-settled rule. Of course it is a very close question whether the parties would not have an adequate remedy at law. They allege that they can show that this stock had no market value, and would not be permitted to show this particular sale to fix its value.

There is a good deal of force in that and the rule is that we permit parties to show the market value of property. But yet, I do not care to say very much about that, because it may be in the future these parties will have to resort to an action at law.

But these two questions have not troubled me very materially, not so much as this other question that has been raised. A specific performance cannot be decreed, under the law, either for the conveyance of real estate or personal property, when the vendor has put it beyond his power to make a conveyance; neither will it be decreed where the rights of *bona fide* purchasers have intervened and attach to the property. This is an elementary rule that nobody, I presume, will dispute.

Another question involved in this case is, whether these Maine men, Woodbury & Moulton, who it is claimed here are part purchasers of this property, are necessary parties to the determination of this litigation? If so, that is the end of the jurisdiction of this court, and there are two very serious questions; and yet they are questions that arise in anticipation, but may meet us right at the threshold of this case. So far as the parties before the court now are concerned, I see no difficulty in this court taking jurisdiction of this case. Just what may be demonstrated when an answer is filed and proof taken as to what rights these parties have acquired in this property, whether they have acquired it in good faith, whether it is executory or in part executed, would all be material questions in determining whether this suit can proceed. But I do not see how I can determine those questions intelligently until answers are filed in this case and some testimony taken showing just exactly what has been done with reference to transferring this stock; whether these parties bought it in good faith, whether it is simply an executory contract or a deposit of fifty thousand dollars has been made in the bank, and some stock deposited there and nothing further done, so that the parties would be placed *in statu quo* and sustain no injury, if this decree is made, of course the court now is unable to determine.

141 This court cannot anticipate that there are some parties necessary, absolutely necessary, to the determination of this question, until some parties come forward and make a showing to that effect. If these parties, who it is claimed by Mr. Mulvane, have purchased this stock do not choose to come forward and assert their rights under this contract, but say "We will take our money back," I do not see there would be any difficulty about that. Nobody here has authority to speak for them as yet. And it seems to me that until the rights of these complainants are determined as to this property in some manner, or until other parties come in here and make some showing that they have acquired rights in good faith or that other parties are necessary which will oust the jurisdiction of this court, it is the duty of this court to say that this property must re-

main in the status that it is now in, until such facts are made to appear.

Of course this may be somewhat of a risky experiment for the complainants in this case, because they have certainly got to give a bond for all damages that the parties sustain. I am rather impressed with the belief that there is a proper and adequate remedy at law; that is, I do not see any serious obstacle in the way of it myself. But yet I must concede that the complainants have the right to come in here and insist, if the law gives it to them, upon a specific performance of this contract.

So there will be a temporary injunction granted upon the complainants giving a bond in the sum of seventy-five thousand dollars to be approved by the clerk.

Substantially correct.

C. G. FOSTER.

Indorsed: No. 6448. Opinion. Filed Mar. 7, 1890. Geo. F. Sharitt, clerk.

Motion to Dissolve Injunction.

In the Circuit Court of the United States for the District of Kansas.

GEORGE P. WESCOTT and SAMUEL HANSON, Complainants,
vs.
JOAB MULVANE, THE TOPEKA WATER SUPPLY COMPANY, THE Topeka Water Company, Edward Coffin, Walter Stanton, Charles Harvey Jackson, and Charles Faucett Street, Engaged in Business under the Firm Name and Style of Coffin & Stanton, and The Atlantic Trust Co., Defendants.

And now comes Joab Mulvane, The Topeka Water Supply Company, and The Topeka Water Company, defendants in the
145 above-entitled suit, and each waiving no rights in the suit, move the court that the temporary injunction heretofore granted and issued in this suit be dissolved at complainants' costs.

WILLIAMS & DILLON,
HURD & DUNLAP,
EUGENE HAGAN,
J. D. McFARLAND,
Solicitors for said Defendants, Joab Mulvane, The Topeka Water Supply Company, and The Topeka Water Company.

Indorsed: No. 6448. U. S. circuit court. George P. Wescott and Samuel Hanson, complainants, *vs.* Joab Mulvane *et al.*, defendants. Motion to dissolve injunction. Filed Mar. 10, 1890. Geo. F. Sharitt, clerk. Williams & Dillon, Hurd & Dunlap, Eugene Hagan, and J. D. McFarland, solicitors for Mulvane *et al.*, Topeka, Kansas.

In the Circuit Court of the United States for the District of Kansas.

The answer of William Edward Coffin, Walter Stanton, Charles H. Jackson, and Charles F. Street, partners doing business under the firm name and style of Coffin & Stanton, defendants, to the bill of complaint of George P. Wescott and Samuel Hanson, complainants.

These defendants now and at all times hereafter, saving and reserving to themselves all and all manner of benefit or advantage of exception, or otherwise, that can or may be had or taken to the many errors, uncertainties and imperfections in said bill contained, for answer thereunto or unto so much and such parts thereof as these defendants are advised it is material or necessary for them to make answer unto, they answer and say:

They admit that they are partners engaged in business under the firm name and style of Coffin & Stanton, in the city and county of New York, in the State of New York, and that they are citizens of the State of New York. Further, these defendants admit that prior to the 12th day of November, 1889, the said defendant The Topeka Water Supply Company was a corporation duly organized and existing under and by virtue of the laws of the State of Kansas, and the defendants aver that said Topeka Water Supply Company still is and exists as such corporation. Further, these defendants admit that the city of Topeka, by ordinance theretofore passed, *and*

146 granted to said Topeka Water Supply Company the right and privilege to supply the city of Topeka and the citizens of said city with water for a period of time in said ordinance named, and the right to extend its pipes throughout any and all streets, avenues, alleys and public grounds of said city, for the purpose of distributing water, and that prior to said time said Topeka Water Supply Company constructed and laid throughout said city a large quantity of pipe for the purpose of distributing water, and also that it possessed and owned an engine-house, grounds, appliances and wells, and was engaged in supplying water by means of said appliances, throughout said city, and that said plant and property was valuable and its operations profitable; and these defendants aver that said Topeka Water Supply Company continued to own and possess said property up to and until the time it conveyed the same to the Topeka Water Company, as hereinafter stated.

These defendants further say that they have no knowledge respecting the transactions alleged in said bill to have taken place between said complainants and said defendant, Joab Mulvane, but they are informed and believe, and therefore charge the fact to be that said complainants and said Mulvane never entered into any valid and binding contract with respect to the sale of said stock by said Mulvane to said complainants; that if said Mulvane and said complainants had any negotiations looking to the formation of a contract for the sale of said stock, said contract was never consummated, and the said complainants, before any contract was consummated, refused to enter into any contract with said Mulvane of the

nature and character contemplated by said parties during the said negotiations, in consequence thereof said Mulvane notified said complainants that he withdrew his proposition that he had made them concerning the sale of said stock, and that he would go no further with said negotiations; that the negotiations, if any, which took place between said complainants and said Mulvane with respect to the sale of said stock, were only of a preliminary nature and were not *and were not* intended to be or become of binding effect unless a definite and complete contract, embodying all the necessary details and terms of said sale should thereafter be agreed upon and entered into between the said parties; that no such contract was entered into, and that said complainants refused to enter into a contract of the kind and nature contemplated at the time of said preliminary negotiations.

These defendants further say that on the 18th day of December, 1889, and prior to the commencement of this suit, these de-
147 fendants, Coffin & Stanton and the firm of Woodbury & Moulton, a copartnership firm composed of William H. Moulton, Theo. C. Woodbury and Edward H. York, engaged in business under the firm name and style of Woodbury & Moulton, purchased of the said Joab Mulvane all of the capital stock of said Topeka Water Supply Company for the sum of five hundred and fifty thousand dollars, and at said time paid to said Joab Mulvane fifty thousand dollars in cash upon the account of said purchase and as a portion of the purchase price, the payment of the remaining five hundred thousand dollars of the purchase price was extended to the 10th day of February, 1890; that at the time of said purchase, as aforesaid, a written agreement was entered into between these defendants and Woodbury & Moulton on the one part and said Joab Mulvane on the other, by the terms of which said five hundred thousand dollars, the balance of the purchase price of said stock, was to be paid on said 10th day of February, and said stock was to be delivered to these defendants and said Woodbury & Moulton as joint owners of the same; that by said purchase on said 18th day of December, 1889, these defendants and said Woodbury & Moulton, jointly became the owners of all of said capital stock of said Topeka Water Supply Company and entitled to the possessions thereof on the payment of the balance of the purchase-money, as then agreed upon; that by the terms of said sale of said stock these defendants and said Woodbury & Moulton were, on the 1st day of January, 1890, entitled to the incomes and profits of said works, and since said 1st day of January, 1890, said water works have been managed, operated and controlled in the interest of and for the benefit of said Woodbury & Moulton and these defendants, and all incomes and profits accounted for to them. A copy of said written agreement is hereto attached marked Exhibit "A" and made a part hereof.

These defendants further say that there is no partnership relations subsisting between them and the said firm of Woodbury & Moulton, and that the firm of these defendants and of said Woodbury & Moulton is each the owner of an undivided interest in said property, to wit: The said firm of Coffin & Stanton own an undivided one-half inter-

est, and the said firm of Woodbury & Moulton own an undivided one-half interest in said shares of stock, and each of said firms has incurred separate obligations on account thereof.

These defendants further say that they did not at the time they jointly with said Woodbury & Moulton purchased, as aforesaid, said stock, or at any time prior thereto have any notice or knowledge or information of any of the pretended claims of said complain-
148 ants set up in their bill of complaint, or that said complainants had or claimed any rights whatever with reference to said capital stock or the property of said Topeka Water Supply Company or that said complainants had or pretended to have any contract with said Joab Mulvane in regard thereto, but on the contrary, they aver that they jointly, with said Woodbury & Moulton, purchased the same in good faith and for a valuable consideration, and in the belief that they jointly with said Woodbury & Moulton were thereby acquiring a perfect right to the same, and that there was no obstacle in the way of such purchase.

These defendants further say that regarding themselves as virtually the owners of all the property of said Topeka Water Supply Company, by reason of the purchase of all of its capital stock as aforesaid, they have materially changed its condition and have incurred large obligations on account thereof; that the capital stock of said Topeka Water Supply Company not being sufficient to allow of a mortgage for future extensions deemed advisable, under the direction of these defendants a new company was incorporated in their interest with a capital stock of one million five hundred thousand dollars, and known as the Topeka Water Company; and thereafter the city council of the city of Topeka was requested to and did pass an ordinance authorizing the conveyance to the Topeka Water Company of all the privileges and franchises granted to the Topeka Water Supply Company by ordinance of said city; and afterwards, on the 31st day of January, 1890, in accordance with the terms in said ordinance, a conveyance was made and duly executed by the Topeka Water Supply Company of all its property and franchises to the said The Topeka Water Company, which deed was duly delivered and a copy thereof, together with the acceptance thereof, filed in the clerk's office of the city of Topeka, as required by the terms of said ordinance; that afterwards, on the 1st day of February, 1890, in pursuance of proper resolutions, a mortgage of one million five hundred thousand dollars was executed by said The Topeka Water Company and was delivered to said defendant The Atlantic Trust Company of New York, as trustee; that said trustee accepted said trust and accepted said mortgage and forwarded the same to the register of deeds at Topeka, Kansas, to be recorded; that these defendants also procured the bonds of the new company to be lithographed and sent the same to the officers of the new company, at Topeka, Kansas, to be signed and executed, and five hundred thousand dollars of said bonds were signed and were ready to be delivered, and would have been delivered, had not such delivery been prevented by the temporary injunction and restraining order issued in this suit;

and these defendants aver that they had devoted a great
149 deal of their valuable time and experience and have expended much money in bringing this property and these securities to the attention of persons who are likely to invest in such property and securities, and thereby have largely added to the commercial value of the same, and these defendants believing in good faith that they were entitled to said bonds, offered the same for sale to their customers and sold two hundred thousand dollars of said bonds, and the said firm of Woodbury & Moulton also sold one hundred thousand dollars thereof for immediate delivery after the 10th day of February, 1890; and these defendants aver that their firm and said Woodbury & Moulton have respectively obligated and bound themselves by contracts binding on them in law to deliver the bonds sold by them as aforesaid, to the respective purchasers thereof immediately after the said 10th day of February, 1890, and said respective purchasers now insist that these defendants and said Woodbury & Moulton perform their said contracts to deliver said bonds, and unless these defendants are able to perform their said contracts for the delivery of said bonds they will be subjected to grave damages and will also be greatly injured in their mercantile credit and standing; and defendants further aver that they and said Woodbury & Moulton procured the residue of the purchase price of said property, to wit, five hundred thousand dollars, and had the same ready to pay on said 10th day of February, 1890, and were ready to receive said stock; and that all of the aforesaid steps were taken and things done by these defendants before they had any notice or knowledge of the pretended claims of said complainants set up in this suit.

These defendants further say that they now have said five hundred thousand dollars on hand for the purpose of paying the balance of the purchase price of said stock, and that they insist and demand that the stock so purchased by them shall be delivered, that said bonds shall be delivered to said Atlantic Trust Company, and that they shall be secured in the benefit of their purchase and protected in the claims of the parties to *and* whom they have sold bonds, as aforesaid.

These defendants further say that they and each of them are residents of the city of New York and of the State of New York, and that they and each of them are citizens of the State of New York, and were such citizens at and before the time of the commencement of this suit; that said William H. Moulton, Theo. C. Woodbury and Edward H. York, who are the persons composing the aforesaid firm
of Woodbury & Moulton, and each of them are residents of
150 the city of Portland and the State of Maine, and each of them are citizens of the State of Maine, and that they and each of them were such citizens at — before the time of the commencement of this suit.

These defendants in addition to the foregoing answer, submit whether or not the said complainants are by reason of the matters and things in said bill contained, entitled to any relief as against these defendants herein, and claims the same benefit by reason

thereof, and in like manner as if they had demurred to said bill for want of equity.

These defendants aver that said William H. Moulton, Theo. C. Woodbury and Edward H. York, partners as Woodbury & Moulton, are not made parties to the bill of complaint, and submit whether or not said parties are necessary and indispensable parties to said bill, and claim the same benefit and advantage by reason of any defect in said bill for want of parties as if they had pleaded the same.

Further, these defendants submit whether or not this court has any jurisdiction to hear and determine any of the matters and things in controversy in this suit, and claim the same benefit and advantage as if they had demurred to said bill for want of jurisdiction or had pleaded the same.

Further answering, these defendants deny all and all manner of unlawful combinations and fraud charged against them in said bill, and deny all and every the matters and things in said bill contained material or necessary for them to make answer unto and not hereinbefore well and sufficiently answered unto, confessed or avoided, traversed or denied; all of which matters and things these defendants are ready and willing to aver, maintain and prove, as this honorable court may direct; and pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

SILAS B. JONES,
J. D. McFARLAND,
Solicitors for the Defendants Coffin & Stanton.

EXHIBIT "A."

Copy.

This agreement, entered into this, the eighteenth day of December, eighteen hundred and eighty-nine, between Joab Mulvane, of Topeka, Kansas, party of the first part, and Coffin & Stanton, of New York city, and Woodbury & Moulton, of Portland, Maine, party of the second part:

Witnesseth, that in consideration of fifty thousand ($50,000) dollars paid by the party of the second part to the party of the first part, as part purchase-money, the receipt of said fifty thou-
151 sand ($50,000) dollars being hereby acknowledged, and for the further consideration of five hundred thousand ($500,000) dollars, to be paid to the party of the first part, on or before February tenth, eighteen hundred and ninety, with interest at the rate of six (6%) per cent. per annum, from January first, eighteen hundred and ninety, by said party of the second part. The party of the first part does hereby sell to the party of the second part the entire capital stock of the Topeka Water Supply Co., of Topeka, Kansas; and it is also agreed that the party of the first part will carry out a plan regarding the legal issuance of stock and bonds by said Topeka Water Supply Company, and the organization of and issuance of stock and bonds by a new company, if desired; said plan to be formulated by

the party of the second part. Said stock and bonds so issued to be delivered to the party of the second part by the party of the first part upon receipt of said purchase price, viz., five hundred and fifty thousand dollars; all expense of such issuance of stock and bonds to be borne by the party of the second part; it being distinctly understood and agreed, however, that in no event shall the party of the first part be required to part with any of the property hereby purchased until the full amount of purchase-money has been paid. Upon the fulfillment and carrying out of the terms and obligations of this contract, it is agreed that all revenue earned by the Topeka Water Supply Company on and after January first, eighteen hundred and ninety, shall become the property of the party of the second part, and that all legitimate charges incurred by said Topeka Water Supply Co. on and after January first, eighteen hundred and ninety, shall be paid out of said revenue. It is also agreed that in the event of the default in payment of said five hundred thousand ($500,000) dollars due on February tenth, eighteen hundred and ninety, and such non-payment is not the fault of said party of the second part, then in that event the party of the first part hereby agrees to give the party of the second part a reasonable extension of time to make such payment of five hundred thousand ($500,000) dollars.

JOAB MULVANE.
COFFIN & STANTON.
WOODBURY & MOULTON.

Copy.
Executed in triplicate. New York city, December 18th, 1889.

Indorsed: No. 6448. U. S. circuit court. George P. Wescott & Samuel Hanson *vs.* Joab Mulvane *et al.* Answer of Coffin & Stanton. Filed Mar. 25, 1890. Geo. F. Sharitt, clerk.

152 *Motion to Dissolve Injunction.*

In the Circuit Court of the United States for the District of Kansas.

GEORGE P. WESCOTT and SAMUEL HANSON, Complainants,
vs.
JOAB MULVANE, THE TOPEKA WATER SUPPLY COMPANY, THE Topeka Water Company, William Edward Coffin, Walter Stanton, Charles H. Jackson, and Charles F. Street, Partners Doing Business under the Firm Name and Style of Coffin & Stanton, and The Atlantic Trust Company, Defendants.

And now come William Edward Coffin, Walter Stanton, Charles H. Jackson and Charles F. Street, partners doing business under the firm name and style of Coffin & Stanton, defendants in the above-entitled suit, and waiving no rights in the suit, move the court that the temporary injunction heretofore granted and issued in this suit be dissolved at complainants' cost.

SILAS B. JONES,
J. D. McFARLAND,
Solicitors for Defendants Coffin & Stanton.

Indorsed: No. 6448. U. S. circuit court. Geo. P. Wescott *et al.* vs. Joab Mulvane *et al.* Motion. Filed Mar. 28, 1890. Geo. F. Shartt, clerk.

Affidavit of Joab Mulvane.

In the Circuit Court of the United States for the District of Kansas.

George P. Wescott and Samuel Hanson, Complainants,
vs.
Joab Mulvane et al., Defendants.

State of Kansas, *County of Shawnee,* } ss:

Joab Mulvane, of lawful age, being first duly sworn, says that he is one of the defendant- in the above-entitled suit; that the paper hereto attached, marked "A," is a full, true and correct copy of the written contract of sale entered into between this affiant and the firm of Coffin & Stanton and the firm of Woodbury & Moulton, on the 18th day of December, 1889; and further affiant saith not.

JOAB MULVANE.

Subscribed and sworn to before me this 27th day of March, A. D. 1890.

[SEAL.] ALFRED G. BASS,
Notary Public.

My term expires July 20, '93.

153 Exhibit "A."

Copy.

This agreement, entered into this the eighteenth day of December, eighteen hundred and eighty-nine, between Joab Mulvane, of Topeka, Kansas, party of the first part, and Coffin & Stanton, of New York city, and Woodbury & Moulton, of Portland, Maine, party of the second part:

Witnesseth, that in consideration of fifty thousand ($50,000) dollars paid by the party of the second part to the party of the first part, as part purchase-money, the receipt of said fifty thousand ($50,000) dollars, being hereby acknowledged, and for the further consideration of five hundred thousand ($500,000) dollars to be paid to the party of the first part, on or before February tenth, eighteen hundred and ninety, with interest at the rate of six (6%) per cent. per annum from January first, eighteen hundred and ninety, by said party of the second part, the party of the first part does hereby sell to the party of the second part the entire capital stock of the Topeka Water Supply Co., of Topeka, Kansas; and it is also agreed that the party of the first part will carry out a plan regarding the legal issuance of stock and bonds by said Topeka Water Supply Company, and the organization of and issuance of stock and bonds by a new company, if desired; said plan to be formulated by the

party of the second part. Said stock and bonds so issued to be delivered to the party of the second part by the party of the first part upon receipt of said purchase price, viz., five hundred and fifty thousand dollars; all expense of such issuance of stock and bonds to be borne by the party of the second part; it being distinctly understood and agreed, however, that in no event shall the party of the first part be required to part with any of the property hereby purchased until the full amount of purchase-money has been paid. Upon the fulfillment and carrying out of the terms and obligations of this contract, it is agreed that all revenue earned by the Topeka Water Supply Company on and after January first, eighteen hundred and ninety, shall become the property of the party of the second part, and that all legitimate charges incurred by said Topeka Water Supply Co. on and after January first, eighteen hundred and ninety, shall be paid out of said revenue. It is also agreed that in the event of the default in payment of said five hundred thousand ($500,000) dollars due on February tenth, eighteen hundred and ninety, and such non-payment is not the fault of said party of the second part, then, in that event, the party of the first part hereby agrees to give the party of the second part a reasonable extension of time to make such payment of five hundred thousand ($500,000) dollars.

154

JOAB MULVANE.
COFFIN & STANTON.
WOODBURY & MOULTON.

Copy.
Executed in triplicate.
New York city, December 18th, 1889.

Indorsed: No. 6448. U. S. circuit court. George P. Wescott & Samuel Hanson *vs.* Joab Mulvane *et al.* Affidavit. Filed Mar. 28, 1890. Geo. F. Sharitt, clerk.

Notice of Motion to Dissolve Injunction.

In the Circuit Court of the United States for the District of Kansas.

GEORGE P. WESCOTT and SAMUEL HANSON, Complainants,
vs.
JOAB MULVANE, THE TOPEKA WATER SUPPLY COMPANY, THE Topeka Water Company, William Edward Coffin, Walter Stanton, Charles H. Jackson, and Charles F. Street, Partners, Doing Business under the Firm Name and Style of Coffin & Stanton, and The Atlantic Trust Company, Defendants.

To said complainants and Messrs. Rossington, Smith & Dallas, their solicitors:

You are hereby notified that the above-named defendants, William Edward Coffin, Walter Stanton, Charles H. Jackson and Charles F. Street, partners doing business under the firm name and style of Coffin & Stanton, will, on Thursday, the 3d day of April, 1890, at 10

o'clock a. m. of said day, or as soon thereafter as the same can be heard, present to the Honorable Henry C. Caldwell, judge of the United States circuit court for the district of Kansas, at his chambers, in the city of Little Rock, in the State of Arkansas, motion and application to dissolve the temporary injunction heretofore granted in the above-entitled suit, and will then and there move that said temporary injunction be dissolved at complainants' costs.

You are further notified that the affidavits now on file and to be filed in the cause, and the other documents, records and files in the suit will be used upon the hearing of said motion and in support thereof.

Dated this 27th day of March, 1890.

SILAS B. JONES,
J. D. McFARLAND,
Solicitors for Defendants Coffin & Stanton.

155 The within notice was served on us the 28th day of March, 1890, by delivering a copy of the same to us.

ROSSINGTON, SMITH & DALLAS,
Solicitors for Complainant.

Indorsed: No. 6448. U. S. circuit court. Geo. P. Wescott *et al. vs.* Joab Mulvane *et al.* Notice of motion. Filed Apr. 1, 1890. Geo. F. Sharitt, clerk.

Notice of Motion to Dissolve Injunction.

In the Circuit Court of the United States for the District of Kansas.

GEORGE P. WESCOTT and SAMUEL HANSON, Complainants,
vs.
JOAB MULVANE, THE TOPEKA WATER SUPPLY COMPANY, THE Topeka Water Company, Edward Coffin, Walter Stanton, Charles Harvey Jackson, and Charles Fawcett Street, Engaged in Business under the Firm Name and Style of Coffin & Stanton, and The Atlantic Trust Co., Defendants.

To the said complainants and Messrs. Rossington, Smith & Dallas, their solicitors:

You are hereby notified that the above-named defendants, Joab Mulvane, The Topeka Water Supply Company and The Topeka Water Company and each of them, will, on Thursday, the 3d day of April, 1890, at 10 o'clock a. m. of said day, or as soon thereafter as they can be heard, present to the Honorable Henry C. Caldwell, judge of the circuit court of the United States for the district of Kansas, at his chambers in the city of Little Rock, in the State of Arkansas, a motion and application to dissolve the temporary injunction heretofore granted in the above-entitled suit, and will then and there move that said temporary injunction be dissolved at complainants' costs.

Further, you are notified that the affidavits now on file in the

cause and the other records, documents and files of the suit will be used upon the hearing of said motion and in support thereof.

Dated this 17th day of March, 1890.

A. L. WILLIAMS,
J. D. McFARLAND,
HURD & DUNLAP, AND
E. HAGAN,
Solicitors for the Above-named Defendants, Joab Mulvane, The Topeka Water Supply Company, and The Topeka Water Company.

156 We hereby accept service of copy of above notice this 17th day of M'ch, 1890.

ROSSINGTON, SMITH & DALLAS,
Complainants' Solicitors.

Indorsed: No. 6448. Notice of motion. Filed Apr. 1, 1890. Geo. F. Sharitt, clerk.

In the Circuit Court of the United States for the District of Kansas.

GEORGE P. WESCOTT and SAMUEL HANSON, Compl'ts,
vs.
JOAB MULVANE, THE TOPEKA WATER SUPPLY CO., THE TOPEKA Water Co., Coffin & Stanton, and The Atlantic Trust Co., Def'ts.

Before Hon. Henry C. Caldwell, circuit judge of the eighth circuit, at chambers, in the city of Little Rock, Arkansas.

And now come said complainants by Rossington, Smith & Dallas, their solicitors, and also comes Joab Mulvane, The Topeka Water Supply Company and The Topeka Water Co., by A. L. Williams, J. D. McFarland, Eugene Hagan and A. A. Hurd, their attorneys, and also come Coffin & Stanton by Silas B. Jones and J. D. McFarland, their attorneys, and the motion of Coffin and Stanton to dissolve the temporary injunction issued in this cause came on for hearing, and it appearing that an indispensable party defendant to this suit is not made a defendant, and cannot be made a defendant without ousting the jurisdiction of the court, the said indispensable party defendant and the plaintiffs being citizens of the same State, and it further appearing that the court granting the temporary injunction postponed the consideration and decision of this question until the coming in of the pleadings and proofs now before me on that subject. It is therefore ordered, considered and adjudged that the temporary injunction granted in this cause by the circuit court on the 13th day of February, 1890, be and the same is hereby dissolved.

April 4, 1890.

HENRY C. CALDWELL,
Circuit Judge of Eighth Circuit.

Indorsed: No. 6448. Geo. P. Wescott *et al. vs.* Joab Mulvane *et al.* Order dissolving injunction. Filed Apr. 7, 1890. Geo. F. Sharitt, clerk.

157 In the Circuit Court of the United States for Dist. of Kas.

GEO. P. WESCOTT & SAMUEL HANSON, Complainants,
vs.
JOAB MULVANE ET AL., Defendants.

It is agreed that the complainants may this day file any pleadings or papers that they might have filed on April rule day as of that day and of like effect as if filed on that day. Nothing herein to prejudice said defendants unless as herein stated.

J. D. McFARLAND,
E. HAGAN,
A. A. HURD, &
A. L. WILLIAMS,
Att'ys for Defendants.

April 10, 1890.

Indorsed: No. 6448. Stipulation. Filed Apr. 10, 1890. Geo. F. Sharitt, clerk.

Exceptions to the Answer of Defendants, Coffin & Stanton for Impertinence.

In the Circuit Court of the United States, District of Kansas.

GEORGE P. WESCOTT and SAMUEL HANSON, Complainants,
vs.
JOAB MULVANE ET AL., Defendants.

Now come said complainants, and except to the answer of the said Coffin & Stanton filed herein, for impertinence. That all of the matter in said answer is impertinent and raises no issue to any of the matters contained in the bill, and should be stricken therefrom, to wit: All the matter in said answer beginning at the words "These defendants," in the fourth paragraph on page third of said bill, down to and including all after said words on page third; all of page four; all of page five; all of page six; all of page seven; all of page eight and the exhibit referred to in said answer and thereunto appended.

Wherefore, said complainants move that all of said impertinent matter be stricken from said answer at said defendants' cost.

ROSSINGTON, SMITH & DALLAS,
Complainants' Solicitors.

158 Indorsed: No. 6448. U. S. circuit court. Geo. P. Wescott *et al. vs.* Joab Mulvane *et al* Exceptions to answer of defendants. Filed Apr. 10, 1890. Geo. F. Sharitt, clerk. Rossington, Smith & Dallas, plaintiffs' attorneys, Topeka, Kansas.

The Replication of George P. Wescott and Samuel Hanson, Complainants, to the Answer of Joab Mulvane, Defendant.

In the Circuit Court of the United States, District of Kansas.

GEORGE P. WESCOTT and SAMUEL HANSON, Complainants,
vs.
JOAB MULVANE ET AL., Defendants.

These repliants, saving and reserving to themselves all and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto saith that they will aver and prove their said bill to be true, certain and sufficient in the law to be answered unto, and that the said answer of the said defendant is uncertain, untrue and insufficient to be replied unto by these repliants; without this, that any other matter or thing whatsoever in the said answer contained, material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true; all which matters and things these repliants are and will be ready to aver and prove as this honorable court shall direct, and humbly pray as in and by their said bill they have already prayed.

ROSSINGTON, SMITH & DALLAS,
Complainants' Solicitors.

Indorsed: No. 6448. United States circuit court. George P. Wescott *et al. vs.* Joab Mulvane *et al.* Replication to answer of Joab Mulvane. Filed Apr. 10, 1890. Geo. F. Sharitt, clerk.

In the Circuit Court of the United States, District of Kansas.

GEORGE P. WESCOTT and SAMUEL HANSON, Complainants,
vs.
JOAB MULVANE ET AL., Defendants.

The replication of George P. Wescott and Samuel Hanson, complainants, to the answer of the Topeka Water Supply Company, defendant.

These repliants, saving and reserving to themselves all and all
159 manner of advantage of exception to the manifold insufficiencies of the said answer for replication thereunto, saith that they will aver and prove their said bill to be true, certain and sufficient in the law to be answered unto, and that the said answer of the said defendant is uncertain, untrue and insufficient to be replied unto by these repliants; without this, that any other matter or thing whatsoever, in the said answer contained, material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true. All which matters and things these repliants are and will be ready to aver and prove as this honorable court shall direct, and humbly pray as in and by their said bill they have already prayed.

ROSSINGTON, SMITH & DALLAS,
Complainants' Solicitors.

Indorsed: No. 6448. United States circuit court. George P. Wescott *et al. vs.* Joab Mulvane *et al.* Replication to answer of the Topeka Water Supply Company. Filed Apr. 10, 1890. Geo. F. Sharitt, clerk.

Order Book "E," page 615, April 10, 1890.

GEORGE P. WESCOTT and SAMUEL HANSON, Complainants,)
vs.) 6448.
JOAB MULVANE ET AL., Defendants.)

Now come said complainants by Rossington, Smith & Dallas, their solicitors, and set down the plea of the Topeka Water Company, filed herein for hearing at the rule day in May, or as soon thereafter as the same can be heard, as to whether said plea is or is not sufficient in point of law.

Motion.

In the Circuit Court of the United States, District of Kansas.

GEORGE P. WESCOTT and SAMUEL HANSON, Complainants,)
vs.)
JOAB MULVANE ET AL., Defendants.)

Now come said complainants and move the court here for an order referring the exceptions of complainants to the answer of Collin & Stanton herein, for impertinence, to —— —— as master in chancery of the court.

ROSSINGTON, SMITH & DALLAS,
Complainants' Solicitors.

Indorsed: No. 6448. United States circuit court. George P. Wescott *et al. vs.* Joab Mulvane *et al.* Motion for reference. Filed Apr. 10, 1890. Geo. F. Sharitt, clerk.

160 In the Circuit Court of the United States, District of Kansas.

GEORGE P. WESCOTT and SAMUEL HANSON, Complainants,)
vs.)
JOAB MULVANE ET AL., Defendants.)

Now come said complainants, by Rossington, Smith & Dallas, their solicitors, and dismiss the bill of complaint herein as to the Atlantic Trust Company, and direct the clerk to enter said order of dismissal upon the order book.

ROSSINGTON, SMITH & DALLAS,
Complainants' Solicitors.

Indorsed: No. 6448. United States circuit court. George P. Wescott *et al. vs.* Joab Mulvane *et al.* Order of dismissal as to the Atlantic Trust Co. Filed Apr. 10, 1890. Geo. F. Sharitt, clerk.

Know all men by these presents, that we, George P. Westcott, of Portland, Maine, and Samuel Hanson, of Boston, Massachusetts, hereby constitute and appoint Rossington, Smith & Dallas, of Topeka, Kansas, our true and lawful attorneys for us and each of us, in our names and stead, to sign, execute and deliver for us as principals a certain injunction bond for the penal sum of seventy-five thousand dollars, dated May 23, 1890, with A. J. Tullock and W. M. B. Lee as sureties, in a certain cause pending in the circuit court of the United States, at said Topeka, wherein we are complainants and Mulvane and others are defendants, and we hereby adopt and confirm the signing of said bond as above already done, and agree to be bound thereby fully, as if made by ourselves, and do hereby declare that our said attorneys had full power and authority in the premises.

Hereby granting out said attorneys full power and authority to act in and concerning the premises as fully and effectually as we might do if personally present, and we do hereby fully confirm and adopt all acts done for us and in our respective names, by our said attorneys in the premises prior to the actual execution of these presents by us.

In witness whereof, we hereto set our hands and seals May 28th, 1890.

GEO. P. WESCOTT.
SAM'L HANSON. [SEAL.]

161 MASSACHUSETTS, } ss:
Suffolk, }

AT BOSTON, *May* 28, 1890.

Personally appeared said Samuel Hanson, to me known, and acknowledged the foregoing instrument by him subscribed, to be his free act and deed. Before me,

JOHN R. BALLARD, [SEAL.]
Notary Public.

MAINE, } ss:
Cumberland, }

AT PORTLAND, *May* 28, 1890.

Personally appeared said George P. Westcott, to me known, and acknowledged the foregoing instrument, by him subscribed, to be his free act and deed. Before me,

NATHAN CLEAVES, [SEAL.]
Notary Public.

Know all men by these presents, that we, George P. Wescott and Samuel Hanson as principals, and A. J. Tullock and W. M. D. Lee, of Leavenworth, Kansas, as sureties, are held and firmly bound unto Joab Mulvane, the Topeka Water Supply Company, a corporation, the Topeka Water Company, a corporation, William Edward Coffin, Walter Stanton, Charles H. Jackson and Charles F. Street, partners doing business under the firm name and style of Coffin & Stanton, and the Atlantic Trust Company, a corporation, in the sum of seventy-five thousand dollars ($75,000), lawful money of the United States, for the payment of which well and truly to be made, we bind our-

selves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

The condition of the above obligation is such that, whereas, in a certain suit pending in the circuit court of the United States for the district of Kansas, wherein the said George P. Wescott and Samuel Hanson are complainants, and the said Joab Mulvane, The Topeka Water Supply Company, The Topeka Water Company, William Edward Coffin, Walter Stanton, Charles H. Jackson and Charles F. Street, partners doing business under the firm name and style of Coffin & Stanton, and The Atlantic Trust Company are defendants, a temporary restraining order was, upon the filing of the bill in said suit, granted and issued against said defendants, and afterwards and on the 13th day of February, 1890, it was ordered by said court that upon said complainants giving a bond to be approved by the
162 court in the sum of seventy-five thousand dollars within two days thereafter, (conditioned that the said complainants should pay all damages to the said defendants against whom said injunction was granted resulting from the granting of said restraining order, and said injunction provided that it should be ultimately held that said injunction or said restraining order were unlawfully granted,) a temporary injunction should be granted and issued in said suit in favor of said complainants and against said defendants, Joab Mulvane, The Topeka Water Supply Company and The Topeka Water Company, and

Whereas, within the period as aforesaid limited for the giving of said bond, the said complainants applied to the court for an order to deposit with the clerk of said court in lieu of the bond as aforesaid, the sum of seventy-five thousand dollars in cash, which said order was granted, and said sum of seventy-five thousand dollars in cash was thereupon deposited with said clerk, and said money was so received in lieu of said bond, and thereupon, said temporary injunction issued as upon a bond being given, and,

Whereas, upon the application of said complainants as aforesaid for leave to substitute a bond for said cash deposit as aforesaid, leave was granted to give a bond to be approved by the court, and upon approval thereof, said complainants should be permitted to withdraw said cash deposit in the hands of the clerk, and,

Whereas, before the filing and approval of said bond last as aforesaid, the said injunction so as aforesaid allowed was, upon motion of certain defendants herein, by one of the judges of said court dissolved.

Now, therefore, if the said George P. Wescott and Samuel Hanson shall pay, or caused to be paid, to the said Joab Mulvane, the Topeka Water Supply Company, the Topeka Water Company, William Edward Coffin, Walter Stanton, Charles H. Jackson, and Charles F. Street, partners doing business under the firm name and style of Coffin & Stanton, and the Atlantic Trust Company, and to each of them, all damages which they, or either of them, have already sustained or may at any time sustain by reason of the granting or issuing of said restraining order, or the granting and issuing of said temporary injunction, if it shall be finally decided that said

restraining order or said temporary injunction ought not to have been granted, or the withdrawing from the hands of the clerk the said sum of seventy-five thousand dollars deposited in lieu of the bond as required by the court to be given, then the above
163 obligation shall be null and void; otherwise shall be and remain in full force and effect.

In witness whereof, we have hereunto set our hands this 23rd day of May, A. D. 1890.

A. J. TULLOCK,
W. M. D. LEE,
GEORGE P. WESCOTT,
By ROSSINGTON, SMITH & DALLAS,
His Attorneys.
SAMUEL HANSON,
By ROSSINGTON, SMITH & DALLAS,
His Attorneys.

Approved May 24, 1890.

C. G. FOSTER, *Judge.*

STATE OF MISSOURI, }
County of Jackson, } ss:

A. J. Tullock, being first duly sworn, deposes and says that he is worth over and above all debts, exemptions and liabilities, the sum of seventy-five thousand dollars. And further affiant saith not.

A. J. TULLOCK.

Subscribed and sworn to before me this 23rd day of May, 1890.
[SEAL.] HARRY G. CRAIN,
Notary Public, Jackson Co., Mo.

Commission expires June 17, 1891.

STATE OF MISSOURI, }
County of Jackson, } ss:

W. M. D. Lee, being first duly sworn, deposes and says that he is worth over and above all debts, exemptions and liabilities, the sum of seventy-five thousand dollars. And further affiant saith not.

W. M. D. LEE.

Subscribed and sworn to before me this 23rd day of May, 1890.
[SEAL.] HARRY G. CRAIN,
[*Seal.*] *Notary Public, Jackson Co., Mo.*

Commission expires June 17, 1891.

164 Indorsed: No. 6448. George P. Wescott *et al. vs.* Joab Mulvane *et al.* Injunction bond. Filed June 3, 1890. Geo. F. Sharitt, clerk.

UNITED STATES OF AMERICA, }
District of Kansas, } ss:

At a term of the circuit court of the United States of America for the district of Kansas, begun and held at the city of Leavenworth,

in said district on Monday the 2nd day of June, 1890, proceedings were had, and appear of record, in words and figures following, to wit:

TUESDAY, *June 3rd*, 1890.

GEORGE P. WESCOTT and SAMUEL HANSON
vs. 6448.
JOAB MULVANE ET AL.

It is ordered by the court that the clerk turn over to the complainants herein $75,000 which is on deposit in lieu of bond in this suit, a bond for injunction having been substituted and filed. Continued.

TUESDAY, *June 10th*, 1890.

GEORGE P. WESCOTT and SAMUEL HANSON
vs. 6448.
JOAB MULVANE ET AL.

Leave is hereby given by the court to plaintiff to withdraw exceptions to defendants' answer and takes leave to reply.

SATURDAY, *June 14th*, 1890.

GEORGE P. WESCOTT & SAMUEL HANSON
vs. 6448.
JOAB MULVANE ET AL.

This cause came on for hearing on the plea of the Topeka Water Company to the bill of complaint herein, the complainants appearing by W. H. Rossington, their attorney, and the defendant, The Topeka Water Company, by J. D. McFarland, its attorney. After hearing the arguments of counsel the court sustains said plea.

The Replication of George P. Wescott and Samuel Hanson, Complainants, to the Plea of The Topeka Water Company, Defendant.

In the Circuit Court of the United States, District of Kansas.

GEORGE P. WESCOTT and SAMUEL HANSON, Complainants,
vs.
JOAB MULVANE ET AL., Defendants.

165 These repliants, saving and reserving unto themselves now and at all times hereafter, all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said plea, for replication thereunto, say that they will aver, maintain and prove their said bill of complaint to be true, certain and sufficient in law to be answered unto, and that the said plea of the said defendant is uncertain, untrue and insufficient to be replied unto by these repliants. Without this, that any other matter or thing whatsoever in the said plea contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is

true. All which matters and things these repliants are and will be ready to aver, maintain and prove as this honorable court shall direct, and humbly pray, as in and by their said bill they have already prayed.

ROSSINGTON, SMITH & DALLAS,
Complainants' Solicitors.

Indorsed: No. 6448. United States circuit court. George P. Wescott *et al. vs.* Joab Mulvane *et al.* Replication. Filed Jun- 24, 1890. Geo. F. Sharitt, clerk.

The Replication of George P. Wescott and Samuel Hanson, Complainants, to the Answer of Coffin & Stanton, Defendants.

In the Circuit Court of the United States, District of Kansas.

GEORGE P. WESCOTT and SAMUEL HANSON, Complainants,)
vs.
JOAB MULVANE ET AL., Defendants.)

These repliants, saving and reserving unto themselves now and at all times hereafter, all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer, for replication thereunto, say that they will aver, maintain and prove their said bill of complaint to be true, certain and sufficient in law to be answered unto, and that the said answer of the said defendants is uncertain, untrue and insufficient to be replied unto by these repliants. Without this, that any other matter or thing whatsoever in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied,
166 is true. All which matters and things these repliants are and will be ready to aver, maintain and prove as this honorable court shall direct, and humbly pray as in and by their said bill they have already prayed.

ROSSINGTON, SMITH & DALLAS,
Complainants' Solicitors.

Indorsed: No. 6448. United States circuit court. George P. Wescott *et al. vs.* Joab Mulvane *et al.* Replication. Filed Jun- 24, 1890. Geo. F. Sharitt, clerk.

Stipulation.

In the Circuit Court of the United States, District of Kansas.

GEORGE P. WESCOTT and SAMUEL HANSON, Complainants,)
vs.
JOAB MULVANE ET AL., Defendants.)

It is hereby stipulated and agreed by and between the said complainants, by Rossington, Smith & Dallas, their solicitors, and the said defendant, The Topeka Water Company, by J. D. McFarland,

its solicitor, that the said complainants may file a replication to the plea of the said The Topeka Water Company filed herein.

This stipulation is made in pursuance of an agreement made in open court at the time said plea was argued.

ROSSINGTON, SMITH & DALLAS,
Complainants' Solicitors.

J. D. McFARLAND,
Solicitor for the Topeka Water Company.

Indorsed: No. 6448. U. S. circuit court. George P. Wescott *et al.* *vs.* Joab Mulvane *et al.* Stipulation. Filed June 25, 1890. Geo. F. Sharitt, clerk. Rossington, Smith & Dallas, complainants' solicitors, Topeka, Kansas.

Stipulation.

In the Circuit Court of the United States for the District of Kansas.

GEORGE P. WESCOTT and SAMUEL HANSON, Complainants,
vs.
JOAB MULVANE ET AL., Defendants.

It is hereby stipulated by and between the parties hereto that the time within which testimony may be taken in the above-en-
167 titled cause is hereby extended and enlarged to the first day of November, 1890, and that any and all of the parties hereto may take testimony to be used herein for any purpose for which testimony may be used at any time prior to the first day of November, 1890, and that an order to this effect may be made and entered herein.

ROSSINGTON, SMITH & DALLAS,
Solicitors for Complainants.

J. D. McFARLAND,
Solicitors for Defendants.

Indorsed: No. 6448. Stipulation. Filed Aug. 25, 1890. Geo. F. Sharitt, clerk.

Order.

In the Circuit Court of the United States for the District of Kansas.

GEORGE P. WESCOTT and SAMUEL HANSON, Complainants,
vs.
JOAB MULVANE ET AL., Defendants.

Upon good cause shown, and by consent of the parties, it is hereby ordered by the court that the time within which testimony may be taken in the above-entitled cause, is hereby extended and enlarged to the first day of November, 1890, and that any and all of the parties hereto may take testimony in this cause to be used herein for any purpose for which testimony may be used at any time prior to the said first day of November, 1890.

C. G. FOSTER, *Judge.*

August 25, 1890.

Indorsed: No. 6448. Order. Filed Aug. 25, 1890. Geo. F. Sharitt, clerk.

Stipulation.

In the Circuit Court of the United States for the District of Kansas.

GEORGE P. WESCOTT and SAMUEL HANSON, Complainants,
vs.
JOAB MULVANE, THE TOPEKA WATER SUPPLY COMPANY, The Topeka Water Company, William Edward Coffin, Walter Stanton, Charles Harvey Jackson, and Charles Fawcett Street, Partners, Engaged in Business under the Firm Name and Style of Coffin & Stanton, Defendants. } No. 6448.

In equity and now pending in the first division of said district.

It is hereby stipulated by and between the above-named complainants and the said defendant, Joab Mulvane, as follows:

168 1st. This cause shall be continued until the June term, 1891, of this court.

2nd. The time for taking testimony herein is and by order of the court shall be extended and enlarged until the 15th day of May, 1891, but said complainants shall take their testimony-in-chief in this cause before the first day of March, 1891. Defendant shall have until the 15th day of April in chief, and compl'ts until 15th day of May to take their testimony in rebuttal.

3rd. The defendants herein shall not be required to take any testimony in this cause until after the complainants shall have taken their testimony-in-chief, and in case the complainants do not take their testimony before this cause is called for hearing then complainants' bill herein shall be dismissed.

4th. This cause shall be submitted and heard before the full bench of the court.

ROSSINGTON, SMITH & DALLAS,
Solicitors for Complainants.
A. L. WILLIAMS,
J. D. McFARLAND,
Sol'rs for Defendant Joab Mulvane.

Indorsed: No. 6448. Stipulation. Filed Oct. 7, 1890. Geo. F. Sharitt, clerk.

Stipulation.

In the Circuit Court of the United States for the District of Kansas.

GEORGE P. WESCOTT and SAMUEL HANSON, Complainants,
vs.
JOAB MULVANE, THE TOPEKA WATER SUPPLY COMPANY, The Topeka Water Company, William Edward Coffin, Walter Stanton, Charles Harvey Jackson, Charles Fawcett Street, Partners, Engaged in Business under the Firm Name and Style of Coffin & Stanton, Defendants. } No. 6448.

In equity and now pending in the first division of said district.

It is hereby stipulated in the above-entitled cause, between the complainants and defendants, Coffin & Stanton, and The Topeka Water Supply Company and The Topeka Water Company, as follows:

169 1. The complainant hereby dismiss their bill as to the above-named defendants, Coffin & Stanton, The Topeka Water Supply Company, The Topeka Water Company, and discharge said defendants and each of them from all liability to complainants by reason of any of the matters alleged or prayed for in the bill of complaint in this cause.

2. Complainants hereby withdraw so much of their bill as seeks a specific performance of the alleged contract between complainants and Joab Mulvane, described in said bill of complaint.

3. In consideration of the above, the said defendants, Coffin & Stanton, The Topeka Water Supply Company and The Topeka Water Company, and each of them hereby waive, release and relinquish, any and all rights of action they, or any of them, may have, if any, against the plaintiffs on the injunction bond given herein or otherwise, by reason of the complainants having sued out a temporary injunction in this cause.

4. Nothing contained in this stipulation shall be construed in any way as an admission that complainants' bill was improperly brought for specific performance.

5. Nothing contained in this stipulation shall enlarge or lessen, or in any manner affect the rights or remedies of complainants against Joab Mulvane in this suit or in any other action, except as contained in paragraph 2 hereof; nor shall anything contained herein enlarge or lessen, or in any manner whatever affect the rights or remedies of Joab Mulvane against complainants in this or any other action.

ROSSINGTON, SMITH & DALLAS,
Sol. for Compl'ts.

COFFIN & STANTON,
By SILAS B. JONES, *Their Sol.*
A. L. WILLIAMS,
J. D. McFARLAND,
Sol. for The Topeka Water Supply Company & The Topeka Water Company, Defendants.

Indorsed: No. 6448. Stipulation. Filed Oct. 7, 1890. Geo. F. Sharitt, clerk.

170 In the Circuit Court of the United States for the District of Kansas.

GEORGE P. WESCOTT and SAMUEL HANSON, Complainants,
vs.
JOAB MULVANE, THE TOPEKA WATER SUPPLY COMPANY, The Topeka Water Company, William Edward Coffin, Walter Stanton, Charles Harvey Jackson, and Charles Fawcett Street, Partners, Engaged in Business under the Firm Name and Style of Coffin & Stanton, Defendants. } No. 6448.

In equity and now pending in the first division of said district.

Now come the complainants herein by their solicitors, and also the defendants, The Topeka Water Supply Company, The Topeka Water Company and Coffin & Stanton by their solicitors, and it appearing to the court that the complainants and the said defendants heretofore, to wit, on the 7th day of October, 1890, filed in this cause written stipulation in words as follows, to wit:

It is hereby stipulated in the above-entitled cause, between the complainants and defendants, Coffin & Stanton and The Topeka Water Supply Company, and The Topeka Water Company, as follows:

1. The complainants hereby dismiss their bill as to the above-named defendants, Coffin & Stanton, The Topeka Water Supply Company, The Topeka Water Company, and discharge said defendants and each of them from all liability to complainants by reason of any of the matters alleged or prayed for in the bill of complaint in this cause.

2. Complainants hereby withdraw so much of their bill as seeks a specific performance of the alleged contract between complainants and Joab Mulvane, described in said bill of complaint.

3. In consideration of the above, the said defendants, Coffin & Stanton, The Topeka Water Supply Company and The Topeka Water Company, and each of them hereby waive, release and relinquish any and all rights of action they, or any of them, may have, if any, against the plaintiffs on the injunction bond given herein or otherwise, by reason of the complainants having sued out a temporary injunction in this cause.

4. Nothing contained in this stipulation shall be construed in any way as an admission that complainants' bill was improperly brought for specific performance.

171 5. Nothing contained in this stipulation shall enlarge or lessen, or in any manner affect the rights or remedies of complainants against Joab Mulvane in this suit or in any other action, except as contained in paragraph two hereof; nor shall anything contained herein enlarge or lessen, or in any manner whatever affect

the rights or remedies of Joab Mulvane against complainants, in this or any other action.

It is therefore ordered, adjudged and decreed by the court that the complainants' bill of complaint herein be and the same is now dismissed as to said defendants, The Topeka Water Supply Company, The Topeka Water Company and Coffin & Stanton, under the terms of and in pursuance of the provisions of said stipulation.

C. G. FOSTER, *Judge.*

Indorsed: No. 6448. Wescott *et al. vs.* Mulvane *et al.* Form of order dismissing as to certain defendants. Filed Nov. 28, 1890. George F. Sharitt, clerk.

In the Circuit Court of the United States in and for the District of Kansas.

George P. Wescott and Samuel Hanson, Complainants, *vs.* Joab Mulvane, The Topeka Water Supply Company, The Topeka Water Company, William Edward Coffin, Walter Stanton, Charles Harvey Jackson, and Charles Fawcett Street, Partners, Engaged in Business under the Firm Name and Style of Coffin & Stanton, Defendants.	No. 6448.

In equity and now pending in the 1st division of said district.

And now come as well the complainants herein, by their solicitors, as the said defendant, Joab Mulvane, by his solicitors, and under the terms of, and in pursuance of the provisions of a written stipulation between said complainants and said defendant, Joab Mulvane, filed in this cause on the 7th day of October, 1890, and upon good cause shown, it is hereby ordered, adjudged and decreed by the court that the time within which testimony may be taken in the above-entitled cause be and the same is hereby extended and enlarged to the 1 th day of May, 1891; but said complainants shall take their testimony-in-chief in this cause before the first day of March, 1891; and the defendant, Joab Mulvane, shall have until the 15th day of April, 1891, in which to take testimony-in-chief; and said complainants shall have until the 15th day of May, 1891, to take testimony in rebut-al.

172 And it is further ordered by the court that said cause be and the same is hereby continued until the next term of this court, the same being the June term, 1891.

C. G. FOSTER, *Judge.*

Indorsed: No. 6448. In circuit court United States, dist. of Kansas. George P. Wescott and Samuel Hanson, compl'ts, *vs.* Joab Mulvane *et al.*, def't-. Filed Nov. 28, 1890. Geo. F. Sharitt, clerk.

UNITED STATES OF AMERICA, } ss:
District of Kansas, }

At a term of the circuit court of the United States of America, for the district of Kansas, begun and held at the city of Topeka, in said district, on Monday, the 24th day of November, 1890, proceedings were had and appear of record in words and figures following, to wit:

FRIDAY, *December* 12, 1890.

GEORGE P. WESCOTT and SAMUEL HANSON } 6448.
vs.
JOAB MULVANE ET AL. }

It is ordered by the court that H. P. Dillon be and he is hereby appointed special examiner herein.

United States Circuit Court, District of Kansas. In Equity.

GEO. P. WESCOTT ET AL. } No. 6448.
vs.
JOAB MULVANE. }

Pursuant to an order of the court made in the above-entitled suit on the — day of December, 1890, Hiram P. Dillon, master in chancery, was appointed for the purpose of taking testimony. Notice was served upon the solicitors of the various parties in interest that testimony would be taken on behalf of the complainants, in Boston, on Monday, the 16th of February, 1891.

Present: Mr. Charles B. Smith, of the firm of Rossington, Smith & Dallas, representing the complainants, and Mr. A. L. Williams, representing the defendant.

GEO. P. WESCOTT, being duly sworn as a witness for the complainants, testified as follows in answer to interrogatories propounded by Mr. Smith, of counsel for complainants:

173 Int. 1. Are you one of the complainants in this case?
A. I am.

2. Where do you live, and what is your general business?

A. In Portland, Maine; my general business is that of owning and managing water-supply corporations.

3. How long have you been engaged in business of that character?

A. 14 years; since 1876.

4. Do you know Mr. Hanson, your co-complainant, and also Mr. Mulvane, the defendant?

A. I do.

5. How long have you known Mr. Hanson?

A. I have known Mr. Hanson 25 years.

6. What is his business at the present time?

A. Mr. Hanson at the present time is in the banking business, and is connected with the Maverick bank.

7. How long have you known Mr. Joab Mulvane?

A. I have known Mr. Joab Mulvane since the 12th of November, 1889; I first met him at Topeka, November 12, 1889.

8. What occasion had you, if any, for going to Topeka at that time, or why did you go?

A. The occasion of my visit to Topeka was at the instance of Mr. Hanson, who informed me that there was a water-works plant in Topeka which he had an intimation from Mr. Mulvane could be purchased; we went there for the purpose of meeting Mr. Mulvane and for the purpose of purchasing the water works at Topeka.

9. When was the first time that you had an interview with Mr. Hanson with reference to the acquirement of property at Topeka?

A. In October, previous to the November of visiting there.

10. Do you know whether Mr. Hanson had been in Topeka before this time and inspected this property?

A. He had. In the early part of October Mr. Hanson and myself went south as far as Knoxville, and we parted company in that vicinity with the ostensible purpose of his going to Topeka. I might say that while at Knoxville we looked at the plant in Knoxville with the intention of purchasing that, and Mr. Hanson went to Topeka for the purpose of seeing the water works there with a view to purchasing them, as we have associated ourselves for the purpose of purchasing water works wherever we can find them if we can do so at a reasonable price. Mr. Hanson left to go to Topeka and Leavenworth with the ostensible purpose of purchasing those works or seeing if they were for sale.

11. In what water works are you interested in this country?

A. The Portland Water Company, Portland, Maine, with
174 a capital of a million dollars, of which I have been superintendent since 1876; a water company in Springfield, Mo., which is owned by a syndicate of which Mr. Hanson and myself are two; water works at Biddeford and Saco, State of Maine; water works in Rockland, Camden and Thomaston, State of Maine; water works in Augusta and Chelsea, State of Maine; water works in Brunswick, Ellsworth, Bucksport and Calais, State of Maine, and St. Stephens, New Brunswick. Those are the water works in which I am interested, which I constructed, and I am the principal owner of them all.

12. At the time that you and Mr. Hanson met in Topeka had you at your command or under your control the money to make the purchase which you subsequently made?

A. Before going West we arranged with the Maverick bank for any sum of money up to a million dollars that we might require for the purchase of works; we left here for the purpose of visiting Topeka and Denver; we went to Denver first to purchase those works and came back and stopped at Topeka on our return; we had arranged with the bank to furnish us the money we required for the purchase of any plant which we might purchase; we had previously purchased the works at Springfield, Mo., under exactly the same conditions.

13. Was the Maverick national bank at that time in such financial condition that it could furnish such funds if necessary?

A. We thought that they were.

14. What is the financial strength of that institution, if you know?

A. That I could not answer of my own knowledge. I might say, however, that the capital stock is $600,000, and it has a large surplus; more than a million, I think.

15. After going to Topeka did you meet Mr. Mulvane there?

A. I met him there.

16. Whereabouts and when?

A. I met him at his office on the 12th day of November, 1889, in the afternoon.

17. Who were present at that time?

A. Mr. Hanson and myself, with Mr. Mulvane.

18. Now I wish you would go on without specially being interrogated and state what occurred at this interview between yourself and Mr. Hanson on one part and Mr. Mulvane on the other?

A. We went into Mr. Mulvane's office and found him in; another gentleman was present whom he asked to go out of the office, and then Mr. Hanson opened the question of the purchase of the works, and asked if we might examine the works with a view of purchase; he gave his consent and told us how to proceed; that we were
175 authorized in the afternoon to visit the pumping station and see that as much as we wanted, but we were not to go to the office of the company without first seeing him again; we visited the pumping station. We left his office with the understanding that we were to meet the next morning. In the meantime we were to satisfy ourselves with regard to the city, the pumping station and the plant generally, with the understanding that in the morning he would meet us in the office and show us the books of the corporation. We took a ride around the city and visited the pumping station and the next morning we met Mr. Mulvane by appointment and went to the company's office; at that place we were introduced to Mr. O'Brien, the secretary, the books were produced and we were enabled to make such abstracts of the books as we thought fit to take; we had previously been supplied with the quarterly statements of the business of the company and we examined the books for the purpose of testing the quarterly statements. After having made an examination of the books we parted company with Mr. Mulvane with the understanding that he was to come to the hotel in the afternoon at two o'clock; I have forgotten the name of the hotel we were stopping at, but it was just around the corner from Mr. Mulvane's office—just below; a new hotel, looking out on the pumping station; at two o'clock he came to the office with Mr. Shaw, whom he desired, if we purchased the works, to be made superintendent; he was to supersede Mr. O'Brien and take the superintendence of the works. We were introduced to Mr. Shaw and after a short conversation he retired and we opened negotiations directly with Mr. Mulvane, Mr. Hanson did, as to the purchase of the works; Mr. Mulvane's price, after considerable conversation, was made; the statement he made was that he wanted $500,000 for the plant; that was conditioned, of course, that he could secure the stock, which he did not have. Our

proposition at that time was $450,000, and we parted company with the understanding that we were to meet again in the evening at five o'clock, I think, to see whether we could agree on a price and terms; at five o'clock we went to his office and met him and at that point he took us not into his office, but into a private room of the bank which adjoins his office, and there we agreed to pay him his price, $500,000; I took a sheet of paper of the bank and turning to a secretary opposite the window wrote out the proposition as I understood it and the terms we had agreed to, with the understanding, as I supposed at that time, that we were to close the negotiations. After agreeing on the form of the purchase, which was dictated mainly by Mr. Mulvane and Mr. Hanson, I signed the offer, Mr. Hanson signed it, and the paper was passed to Mr. Mulvane for his
176 signature; Mr. Mulvane said, on reflection that he was not quite ready to sign the paper inasmuch as he then had only control of part of the stock and this agreement bound him to transfer and deliver the entire capital stock; he did not think it advisable for him to sign until he actually had the stock in his hands. Therefore, he said he would retain the paper which he had signed and during the next ten days would sign it and return it to us or declare the transaction off. Mr. Hanson remonstrated with Mr. Mulvane, that it was hardly businesslike for us to sign the paper and leave it in his hands and therefore he suggested that we copy the paper which was signed and give him the copy; that he should sign the copy and send it to us, and we would return the paper which we had drawn and signed, our signatures to remain on the paper until he had completed the transaction.

19. You may examine, if you please, this paper which I now hand you, and state whether it is the identical paper which was signed at that time, with the exception of the verification subsequently made?

A. Yes, sir; that is the paper which I made in the office of the bank and which was signed by myself and Mr. Hanson, and of which Mr. Mulvane had a copy at the time.

(Paper offered in evidence and marked "Exhibit A.")

20. How long did you remain in Topeka after this conversation had with Mr. Mulvane that you have testified with reference to?

A. We left the office about half past six, I think, that evening, and if I remember correctly, I left the next morning at four o'clock.

21. After signing this paper was any other agreement made between you and Mulvane at that time?

A. No talk whatever.

22. When was the next time, if ever, you heard from Mr. Mulvane?

A. The next time I heard from him was by a letter which he addressed to me on the 22d of November. That letter reads as follows:

"Topeka Water Supply Co., 625 Quincy St., Topeka, Kansas.

NOVEMBER 22, 1889.

George P. Wescott.

DEAR SIR: I cannot write you anything definite today. Will write you again or may see you, as I expect to be in Boston in the near future, and will advise you when. I am going east as soon as my broken arm will allow.

Respectfully yours, JOAB MULVANE.

Excuse left-hand writing and brevity."

177 23. How soon after receiving this letter was it before you heard from him again?

A. On December 4th, 1889, I received the following letter:

"Mr. George Wescott, Portland, Maine.

DEAR SIR: I expect to be in Boston by the 14th instant and will call at the Parker house and shall be pleased to meet you.

"Please accept my thanks for your courtesy in sending the form for accounts. I shall be able to talk with you definitely when we meet as to the business matter heretofore canvassed.

"May I congratulate you upon the triumph of Mr. Reed for Speaker. My right arm is yet in limbo and writing a difficult task.

Yours respectfully, JOAB MULVANE."

24. Mr. Mulvane in his letter refers to some accounts that you had sent him; what accounts has that remark reference to?

A. When at the office of the water company I suggested to him that his accounts were not kept in what we considered a first-class manner with eastern water works and that I would send him the system of accounts which had been followed by the Portland Water Company, which I thought he would be glad to adapt for his company. Whether we purchased or not it would be a good thing for him to change his method of keeping his books, and I sent this model on my return to Portland.

25. When again did you hear from Mr. Mulvane?

A. The next was a telegram which I received on December 13th, dated at Boston:

"Will be at Parker house today and tomorrow.

(Signed) JOAB MULVANE."

26. What did you do after the receipt of this telegram?

A. I replied to him that I would meet him on Saturday at 11 a. m. at the Parker house.

27. Did you come to Boston on that day?

A. I arrived here at 11 o'clock and came down to the Parker house and met Mr. Mulvane.

28. Now, will you go on and state what occurred at that interview and who was present, if anybody?

A. In the afternoon about 2.30 Mr. Hanson and myself met him here at the house. We waited for Mr. Mulvane until some time be-

tween two and three, when Mr. Mulvane came and said he had been detained to make a quorum at some railroad meeting which had been held uptown, and apologized for the delay. We at once retired to room 304, on the School Street corner, and proceeded to talk
178 the matter over with Mr. Mulvane. He said that in acquiring the stock of the company, which he did not hold the minority interest, he had found it necessary to pay a much higher price than he anticipated; therefore it was impossible for him to carry out the agreement or the understanding which we had made at Topeka unless we paid a higher price than $500,000. We asked him what that price was and he said it would be $50,000 higher—$550,000. We discussed the matter a good deal and were very much surprised at the advance in price, because we supposed it had been definitely settled at Topeka as to the price which was to be paid, and it was only a question of the terms of the payment to be discussed. Mr. Mulvane insisted on his receiving the extra $50,000 for the reasons which I have stated, and, after considerable discussion, he finally said that, as a compromise, he would make it $525,000, or $525,000. We told him that if that was his ultimatum we would take it and go off for consultation and return as soon as possible, within half an hour, and give him our answer. We went down to the Maverick bank and talked the matter over with Mr. Potter; told him the situation of affairs just as they stood, and the result was that we came back and declined to accede to the request of Mr. Mulvane or change the price in any particular; that we felt that he had agreed to sell us the property for $500,000, and that that sum was for the purchase of the minority of the stock, all of which he said he had in his possession except $12,000, which he expected to have within a few days; that he had acted as our agent and that the stock was ours at the price. We put our coats on and went so far as to open the door to go out of the room, saying to Mr. Mulvane that if that was his ultimatum we had no reason to stay any longer, and the trade was off fully. Mr. Mulvane then said that inasmuch as we had held out to our associates the fact that $500,000 was the purchase price and there was no way that we could explain our position or his advance and could not concede his right to charge $25,000 more, he would meet the terms which he had made at Topeka. We came back, took our coats off, and I sat down at the table and drew a proposition which he signed and we signed. That was what occurred Saturday afternoon.

29. Is this the proposition that you refer to?

A. That is the proposition which I drew.

30. Will you please read it?

A. (Reading:)

"Parker house, School St., corner of Tremont.

"BOSTON, *December* 14, 1889.

GENTLEMEN: I will sell you the entire capital stock of the Topeka Water Supply Company, of Topeka, Kansas, which consists of
179 1,000 shares of par value of $100 per share for the sum of $500,000, on the following terms of payment, viz: The sum

of sixty thousand dollars ($60,000) to be paid in cash on the signing of the contract to be made and entered into as of this date, the consideration named in said contract to be four hundred and forty thousand dollars ($440,000), to be paid as follows, viz: The sum of two hundred thousand dollars ($200,000), to be paid February 10, 1890; one hundred and forty thousand dollars ($140,000) to be paid February 20, 1890, and one hundred thousand dollars ($100,000) to be paid March 20, 1890. Provided that final payment of the last-named sum of $100,000 may be paid on February 20th if said Wescott & Hanson may elect so to do, by giving me five days' notice of such intention. Payments to be made for and delivery of said stock to be made at the National Bank of North America, in the city of Boston, Massachusetts.

"JOAB MULVANE.

"To George P. Wescott, Samuel Hanson."

"We hereby accept your offer to sell the entire capital stock of the Topeka Water Supply Co. for the price and on the terms and conditions above named.

GEORGE P. WESCOTT.
SAMUEL HANSON."

31. After the signing of this paper what did you do?

A. It had got to be then about 6.30 in the evening; I was going to Portland on the train which left at seven o'clock, and I left the room and went to Portland. The understanding was that I was to return here on Monday morning to complete the negotiation, the understanding being that we were to meet again at this same place Monday evening.

32. Did you return on Monday morning?

A. I returned on Monday morning and came direct to the Parker house to meet Mr. Mulvane again.

33. Did you see him?

A. I went to his room, No. 63, on the second floor.

34. What occurred there?

A. The room was locked, and not finding either Mr. Hanson or Mr. Mulvane, I went at once to the bank to find out what Mr. Hanson had done in the meantime. He informed me that the money was ready to pay Mr. Mulvane, the amount named in the contract, $60,000. I also saw Mr. Work, the cashier.

35. Never mind what Mr. Work said at present; did you see Mr. Mulvane?

A. I saw Mr. Mulvane at 12.30, at the Parker house, at his room, No. 63; at that time we presented the form of contract which Mr. Hanson had prepared, which was the contract referred to in
180 the memorandum of Saturday, which stipulated for the payment of $40,000 in addition to the $60,000.

36. What did he say, if anything?

A. Mr. Mulvane took the contract, looked at it, and he said that was not in accordance with the former agreement. We said: "Very well, Mr. Mulvane; this is a rough draft and it is for you to say

what changes you will have; we are here to make it to suit you if we can; we have got nothing to do except to carry out the agreement we made on Saturday afternoon." Well, we discussed the matter somewhat of his responsibility, and he said that he was amply responsible for everything to carry out, whether we had any further contract or not. I told him that certainly we were equally responsible as he, and that we were amply able to carry out anything that we agreed, but that did not compass the business that we were there for; that we were there to complete the agreement which was commenced on Saturday, and which he had signed. Finally, we went down to room 304, where we were before, and spent the balance of the afternoon in trying to get Mr. Mulvane to offer some suggestion wherein and how the memorandum which Mr. Hanson had prepared and submitted to him differed from that which we had agreed to make on Saturday, and he absolutely failed to signify in any particular in what way it differed.

37. Did he refuse to make any suggestion with reference to it?

A. He didn't refuse, he simply would not say anything; it was what I call a good, square sulk; it was not a refusal, it was simply a sulk.

38. How long were you gentlemen together on the afternoon of Monday?

A. Until 6:30, or until 6 o'clock, when we left the room; it was about 6:30 when we bid him "Good-bye" in the office.

40. What became of this draft of the subsequent agreement that you had prepared, about which you had conversation on Monday?

A. Mr. Mulvane put it in his pocket in room 63 and *and* kept it there, and when he was going out of room 304 he said to us—"Welll," he says, "Gentlemen, I will declare this whole trade off; I am going to leave you." "Well," I said, "Mr. Mulvane, you will leave that memorandum of agreement?" He says, "No, I won't." He had got out of the door and I went to the door, and I says, "You will." He says, "Haven't you got a copy of it?" "No," I says, "I haven't got any copy of it; that agreement is ours, or a copy of it." He says, "Very well, I will go and get a copy made." He kept
181 the agreement and went out and got a typewriter copy made and gave it to us as a copy of the agreement.

41. Had it been signed by yourself and Mr. Hanson?

A. No, sir; it had not been signed; it was a rough draft of an agreement which we submitted to him for his approval and for such changes as would conform to his views.

42. Well, when did you see Mr. Mulvane again?

A. Never; or never after 6:30, when he left us in the office. After leaving us in the room he came downstairs; he had his coat on and I had mine on; we were going out; he said the trade was all off and that he had no further business to do with us; if we wanted to do any further business with him we could have no interview with him, but any letters we would leave at the Bank of North America with Mr. Burr would reach him. I stated to him that we had not done with him, and we should insist on having the agreement carried out.

43. At whose suggestion was it that the National Bank of North America was made the place where the stock was to be turned over to you and the payments to be made?

A. At Mr. Mulvane's, Mr. Burr being his friend and the man to whom he referred for his financial standing; he was the only man whose name was mentioned by Mr. Mulvane as showing that he was a responsible party.

44. Do you remember about Mr. Mulvane saying anything at the time he signed this agreement dated December 14 with reference to the fact that now the matter was settled as you had his signature, which you had not before?

A. He made that statement; he says—"Gentlemen," he says, "that fixes it," or words to that effect; "you have got my signature now; when you were at Topeka you did not have it."

45. When was that said with reference to the time of signing?

A. That was after the signatures were made, about 6.15 or 6.30 in the evening of Saturday; it was immediately when he signed his name to the paper.

46. What steps did you and your associates take after that towards endeavoring to obtain a compliance on the part of Mr. Mulvane with his contract?

A. The next morning Mr. Potter, at our suggestion, addressed a communication to Mr. Mulvane, which was left or delivered to Mr. Burr to be sent to Mr. Mulvane. Mr. Potter, perhaps, can state better than I can in his affidavit what it was. In substance it was that he thought if he would consent to a conference all the matters could be agreed upon and satisfactorily arranged.

182 47. Did you ever hear from Mr. Mulvane after that?

A. No, I did not.

48. After failing to obtain an interview with Mr. Mulvane, what steps did you and your associates take towards enforcing your rights under your contract?

A. I took the papers home and at once drew off a statement, a copy of which I have in my hand, and submitted all the papers to Judge Symonds, of the firm of Symonds & Libby, of Portland, as to the rights which we had under the negotiations with Mr. Mulvane; Judge Symonds informed me that the contract which we had made was good and sufficient and would be binding on Mr. Mulvane.

49. Do you know any reason why immediate steps were not taken towards filing a bill to enforce the contract?

A. We hoped and believed that after Mr. Mulvane had gone away, got back home and thought it over, we should hear from him, and after all, that the matter would be compromised in some manner which would be equitable and fair to both parties. Therefore we thought it was proper to give him sufficient time to think it over.

50. What steps did you finally take?

A. We finally had a conference here; I came to Boston again and talked the thing over, whether it was desirable to call Mr. Mulvane's attention to the agreement he had made that night, and after consultation we decided that it was best to bring the matter to his atten-

tion; that there was an unsettled matter here that, in fairness and equity, we were entitled to have him take up and complete the negotiations with us; we accordingly made a tender to him through you, of the supplementary contract, asking his signature, and stating that we were ready to carry out our agreement.

51. Did you employ counsel and direct a bill to be filed for specific performance of the contract?

A. We did; we sent the papers to Messrs. Rossington, Smith & Dallas, of Topeka, with the request that they should take such action as would enforce our rights in the matter, and with instructions to proceed forthwith.

52. At the time of retaining us was it your desire and intention to obtain, if possible, a transfer of the entire capital stock of the water company to yourselves under the terms of this agreement?

A. That was the object of the proceedings which we authorized them to commence.

53. Was the bill directed to be filed on your part in good faith to accomplish that?

A. It was; that was what we desired, and we believed that the capital stock of the company was ours, and we instructed
183 you to take any method which would give us possession of the property and the capital stock.

54. Have you subsequently learned that it would be impossible now to obtain that stock?

A. I have now, by reason of the stock having passed into other hands than Mr. Mulvane's.

55. Has that occurred since the filing of the bill?

A. That has occurred since the filing of the bill.

56. How many years' experience did you say you had had in water properties?

A. Since 1876.

57. Are you familiar with the value of water plants of the character of the plant in controversy in this suit?

A. I think I am. I have constructed a very large number of water works and have practically operated them, made that my business, and know, I think, full well the value of any water-works plant after having looked it over.

58. What elements are to be taken into consideration in estimating the value of companies of this kind?

A. The elements which go to make up the value of a plant are the capacity of its pumping plant, the extent of its pipe system and the number of population which is contributory to the pipe system—along the line of the system of the pipes; and, of course, the population which the city or town comprises to which extensions can be made from the existing system in order to obtain additional revenue. Coupled with that would be the income of the plant and its fixed charges for cost of operating and the interest account. Deducting the operating expenses and the interest charges from the gross receipts would give the value of the plant, or the amount of money which would be applicable to the payment of interest on its bonds. Now, on the plant in question at Topeka we found as matter

of fact that the gross earnings of the plant, as shown by the books, were in round numbers, $56,000; the operating expenses were in round numbers $11,000; the interest charges were six per cent. on $120,000. Deducting the $11,000 and the $13,000 from the $56,000 would leave a net revenue in round numbers of $31,000. That would be equal to paying the interest on more than $630,000. That would be, in my judgment, the value of the Topeka plant at the date of the purchase, for which we agreed to pay $500,000.

59. How much, then, do you think that you have been damaged by the breach of this contract on the part of Mr. Mulvane?

A. There was also in addition to the takers who were being supplied, from which the $56,000 revenue was derived, we were shown a large number of streets to which the pipes had been ex-
184 tended the year previous, and main streets where the cross-streets from avenue to avenue had not been piped. I estimated that there was in the city an increase of that revenue of perhaps 25 per cent. in sight, which would add to that some thirteen or fourteen thousand dollars of value, which under the management which we should put into that plant would readily bring the revenue the first year up to $70,000 without any material increase of operating expenses or interest charges. In that event the value of the plant would be $775,000, if funded on a six per cent. basis, instead of $630,000. That is, the right of extension is really the value of the franchise; that is, it is continuous with the growth of the population of Topeka. There would be a continued increase yearly. The franchise would sell for a value beyond the $630,000 and would sell for a value beyond the $775,000.

60. How much would be the value of a franchise of that character in addition to the amount you have estimated?

A. I think the value of the franchise of the city of Topeka to introduce water as stated in that contract was $50,000, as it stood on the day that we made the trade.

61. Have you ever seen a report made by a civil engineer by the name of E. T. Fuller?

A. I think I have, at one time.

62. Have you got what purports to be a copy of a report of that character?

A. I have.

63. I wish you would examine it carefully, or state that you have already examined it carefully, and if, from your previous examinations of the property and the surroundings at Topeka, you can testify as to whether this report of the engineer is a correct and truthful report of the character of the property or not?

A. After examining the report of Mr. Fuller, and comparing his figures with minutes which I took from the corporation's books when I was at Topeka, I believe the statement made over Mr. Fuller's signature to be a fair statement, and, as far as I can see, substantially correct, and one that I should say was fair in every sense of the word.

64. How much of an examination did you make of this property before entering into negotiations with reference to the purchase of it?

A. We made an extended examination of the pumps, the wells, the mode of taking its water, the pipe system as laid down on the maps, its size, the streets on which it laid, and the additions to which the pipes could be extended with a view of future increase of the income of the works; it was as extended as it was possible to make by any one who had not put the works in themselves.

185 65. From such examination will you incorporate the engineer's report referred to as a part of your testimony in the case as to the matters of detail stated in the report, and can you do so, having made a sufficient personal examination of the property to make such statement?

A. Yes, sir; I can. I can say truthfully that that would be my best judgment of the plant, and what I saw there fully coincides with the statement over Mr. Fuller's signature which is lying before me.

66. Will you offer that in evidence as part of your own testimony?

A. I do.

(Report of engineer, marked "Exhibit B.")

67. Was the amount, $500,000, to be paid by yourself and Mr. Hanson to Mr. Mulvane to be exclusive of the incumbrance upon the property, amounting to $120,000?

A. No; the property was to be delivered to us free of all incumbrances; we were to pay him $500,000 for the property.

68. Subject to the mortgage?

A. Subject to the $120,000 mortgage; yes.

69. That was the only mortgage upon the property?

A. That is all; all the floating debt was to be paid.

70. Has he ever complied with that and delivered you the stock?

A. He has not.

71. Have you been ready and willing on your part at all times since entering into this agreement to have paid Mr. Mulvane the amount mentioned at the time specified upon the stock being turned over as provided in the contract?

A. We have; there has been no time when we would not have carried out the agreement as stated in the memorandum which we drew for Mr. Mulvane.

72. What was your intention with reference to making this purchase? Was it to be merely a purchase of the stock of the company or was it to be a purchase of the entire plant itself?

A. The intention was to purchase the entire plant itself; that plant was to be managed by myself for the gentlemen who were associated with me; we were not buying stock, we were buying the plant, to be kept and operated for the future.

73. You were seeking, then, a permanent investment?

A. That is what we were after.

Cross-examination.

By Mr. WILLIAMS, of counsel for defendant:

X 1. Mr. Wescott, did you on the 28th day of January, 1890, make an affidavit to be used in the preliminary hearing in this case?

186 A. Yes; I made one.

X 2. Your statements in that affidavit were true, of course?

A. Yes, sir. (Paper handed to witness.) That is it; that is true to the best of my knowledge and belief.

Mr. WILLIAMS: I desire to attach a copy of this affidavit to Mr. Wescott's deposition as an exhibit.

(Marked "Exhibit C.")

X 4. Was there any agreement when you parted with Mr. Mulvane after he had signed this contract as to the mode of paying the $60,000?

A. It was to be paid at the Bank of North America in a New York check.

X 5. That was on Saturday that suggestion was made?

A. Yes.

X 6. There is a preliminary question on a point which I think you did not state in your examination-in-chief. That was one of the changes you made in your Topeka talk, was it not, increasing the amount to be paid from $50,000 to $60,000?

A. My impression is that that is so; that was the amount agreed upon.

X 7. It was originally $50,000, and instead of exacting $50,000 or $25,000 increase, Mr. Mulvane raised the amount from $50,000 to $60,000 that was to be paid then?

A. Yes, sir.

X 8. Did you take any steps to procure that $60,000?

A. I did.

X 9. When?

A. I made the arrangement on Saturday and on Monday I went to the bank and told Mr. Work to remain there; that I would come back for the New York check, and asked him to remain until I came, and he remained until half past 5 at the bank waiting for us to get through the negotiation with Mr. Mulvane, for him to make a delivery of that agreement and for us to make that payment.

X 10. That was on Saturday?

A. No; that was on Monday.

X 11. Did you have the check with you when you went to see Mr. Mulvane with this last contract?

A. I did not.

X 12. Why not?

A. For the reason that we had not completed the agreement, and as soon as we met Mr. Mulvane he declined to discuss, or negotiate, or do anything; but Mr. Work had the check at his office, where we could get it in five minutes without any difficulty.

187 X 13. You did not procure the check itself, then, on Saturday?

A. I did not.

X 14. Nor on Monday?

A. The check was made.

X 15. You did not procure it, I say?

A. No, I did not procure it.

X 16. You did not have it with you?

A. I did not have it with me.

X 17. Did you agree, on Saturday, with Mr. Mulvane, when you would give him the check?

A. No; no agreement. The understanding, or my impression was this, that when he had completed this agreement—what Mr. Mulvane, as I understand, wanted, was first—the agreement on Saturday was a personal agreement with Mr. Mulvane; the one to be completed on Monday was an agreement which he was willing any one should see; the other one was rather a private matter.

X 18. That is not responsive to my question. He was to receive $60,000 during that trip, was he not?

A. To be paid at the Bank of North America.

X 19. At that time?

A. At that time.

X 20. He was not paid that $60,000?

A. For this reason——

X 21. I do not ask for the reason; he was not paid that $60,000?

A. He was not.

X 22. Now, you may state the reason.

A. Because the payment was to be made to the Bank of North America, and not to Mr. Mulvane, at the Parker house.

X 23. Any payment offered at the Bank of North America?

A. No, sir.

X 24. Why?

A. It was to be paid to Mr. Mulvane at that point, not to the bank.

X 25. Why was it not paid to him at that point?

A. Because Mr. Mulvane refused to complete the agreement that he had made on Saturday.

X 26. Did he state to you, at that time, that he did not believe you had any money?

A. He did not.

X 27. At either one of your interviews?

A. No, never. On the contrary, I showed him a letter from the cashier of the Casco bank——

X 28. I just ask you the question if he made that statement to you?

A. He did not.

188 X 29. Did he not make a statement to that effect?

A. To what effect?

X 30. That he believed you had no money?

A. He may possibly have said so after a while; I don't just remember that he did make it. After he left the room, after he had

called everything off, I don't just remember what he said; but during the negotiations——

X 31. I am talking of the time when he refused to sign this last paper.

A. I did not see that statement in the affidavit.

X 32. I merely ask you the question whether he made that statement to you?

A. He may have done so.

X 33. Now, I ask you if you stated in the affidavit that he did?

A. I have not got the affidavit before me. (Affidavit handed to witness.) Yes, it is here, that he said he was satisfied we could not raise the money.

X 34. You did, then, make that statement in your affidavit?

A. I did. That is correct.

X 35. Did Mr. Mulvane tell you when you began your negotiations with him how much of the stock he had with him here?

A. My impression was that he stated some sum. He stated that he did not have all the stock here with him.

X 36. Well, did he state how much he did have?

A. He stated that he owned all except $12,000; had it in his possession at home.

X 37. You say that the contract provided that that $50,000 was to be paid at the Bank of North America?

A. That is my understanding of it. At any rate, it was not to be paid until the other contract was signed.

X 38. And the other one was to be signed immediately?

A. Yes, sir. By the agreement, payment was to be made for and the delivery of said stock to be made at the National Bank of North America in Boston.

X 39. If you intended to pay the $60,000 in cash why did you make any inquiry as to his standing of Mr. Burr?

A. At his request.

X 40. For what purpose?

A. Well, he desired it. He said unless we had taken the trouble to look him up in Kansas, as we had not, he wanted us to make inquiry of Mr. Burr as to his ability and financial standing at home.

X 41. And you saw Mr. Burr?

A. I saw Mr. Burr.

X 42. Did you ask him if he would guarantee the carrying out of this contract?

189 A. No, sir. We told him the transaction we were going to make with Mr. Mulvane. He said that he knew that Mr. Mulvane was in town, but did not know his business. Then I asked him if in his judgment it would be safe for me to pay him $60,000 and let him make delivery of the stock at his pleasure. He thought it would not be a good thing for me to do. He did not think Mr. Mulvane would ask us to do it.

X 43. It was, then, on the strength of this, was it not, that you failed to offer Mr. Mulvane the $60,000?

A. No, sir; it was on his failure to sign the contract. If he had carried out the agreement, and if he had signed the contract, the

supplemental contract of Monday, the money that we required and the payment of the $60,000 would have been arranged all right.

X 44. Arranged how? Would you have paid him the $60,000 then?

A. We would have paid it into the bank.

X 45. "Into the bank." Would you have paid it to him?

A. Not without his putting some stock against it. We could not unless he put some stock against it.

X 46. But did he not state at the interview on the first day that the stock was at his home, all but $12,000?

A. Yes, sir.

X 47. Don't you know you would not have paid him $60,000 unless he put the stock against it?

A. I presume we should not, but the question was not put in that way. If there had been a disposition it could have been arranged undoubtedly.

X 48. I ask you now if, but for this interview with Mr. Burr, you would have paid $60,000 to Mr. Mulvane without his putting stock against it?

A. I think not.

X 49. And your supplemental or final contract which you desired to make was based upon that idea, was it not?

A. No; we *we* asked him to complete the transaction as he had agreed; to complete the sale by signing the supplemental contract.

X 50. But it was framed to remain in that way, was it not?

A. No, sir; it was framed according to the agreement made on Saturday.

X 51. Then this interview with Mr. Burr had no influence upon you?

A. No, sir; it was made entirely after the interviews with Mr. Mulvane.

X 52. Still, it had no influence upon your mind?

A. It may have had some influence—might have had in
190 the financial adjustment of the payments which were contemplated under this agreement of Saturday.

X 53. If Mr. Burr had said he would guarantee the carrying out of that contract you would have delivered Mr. Mulvane the $60,000, would you not?

A. Our proposition was to pay *pay* it to Mr. Burr; to make the payment to him as middleman, and Mr. Mulvane was to *to* put up stock against it.

X 54. That was the proposition that you made to Mr. Mulvane?

A. That was the proposition I made to Mr. Mulvane—that we would put up $60,000 and he should put stock up against it and draw the money.

X 55. Why, then, did you consult Mr. Burr?

A. Because he requested it.

X 56. He having requested it, why should you do it if you did not do it for the purpose of assuring yourself as to his solvency?

A. Well, the object of consulting Mr. Burr was to assure ourselves of his solvency.

X 57. You knew Mr. Burr was solvent?

A. We did.

X 58. If Mr. Burr had guaranteed that contract and the future delivery of the stock you would have paid the $60,000 on that day without stock being put up, would you not?

A. We offered to Mr. Mulvane to pay Mr. Burr the $60,000 and let him put up stock against it at his leisure.

X 59. If Mr. Burr had guaranteed that contract you would willingly have paid the $60,000 without delivery of the stock, would you not?

A. That is what we offered to do; we offered to put $60,000 into Mr. Burr's hands and let him deliver the stock afterwards.

X 60. I will put the question in another form and see if I can get an answer. If Mr. Burr had guaranteed the future delivery of the stock within the time mentioned upon the payment of $60,000 to Mr. Mulvane, you would have paid Mr. Mulvane the $60,000, would you not, on that guarantee?

A. I have no doubt we should.

X 61. But you would not after what Mr. Burr had said to you?

A. No.

X 62. Will you attach to your deposition, Mr. Wescott, a copy of this contract which you tendered to Mr. Mulvane?

A. That was only a rough draft, not a contract.

X 63. Well, the rough draft?

A. That was a rough draft, to be changed——

191 X 64. I asked you if you would attach a copy of it to your deposition. I was not discussing the terms of it. You did not produce a copy of it to Mr. Smith?

A. The copy that we have, Mr. Williams, I do not know to be a copy of what we presented to Mr. Mulvane; therefore, I could not attach what I do not know. He has the original copy.

X 65. You do not know that that is a true copy?

A. No; I don't know that it is. He went out and brought it in, made by a typewriter, which he says is a true copy; I don't know that it is.

X 66. Any reason to doubt it?

A. There were interlineations which I had made which did not appear in the typewriter copy.

X 67. It was not, then, a true copy?

A. It was not a true copy; no, sir. I had tried to perfect it so as to satisfy some objections which he had.

X 68. And you are very positive that the copy which was presented to you was not a true copy?

A. It was not in the interlineations. There was none on it then.

X 69. Did you state in your affidavit of the 28th of January, 1890, that it was a copy?

A. It purported to be a copy.

X 70. Will you answer the question, Mr. Wescott? Did you state in your affidavit of January 28, 1890, that it was a true copy of the contract? You can say yes or no. It is a very simple question. I

did not put in the word, "purported," at all. I asked you if you stated that it was a true copy of the contract?

A. (Reading from the affidavit referred to:) "At 12.30 p. m. Mr. Hanson and myself went to the Parker house and retired to his room, No. 63, where we gave him the form of contract prepared by Mr. Hanson to look over, and asked him what changes he would suggest. The following is a copy of the contract." That is a copy of the agreement which was submitted to Mr. Mulvane for his signature as he returned it to us. I say here in the same part of my affidavit: "We called him back and suggested that he return the memorandum which he had in his pocket, which he declined to do, saying that he supposed we had a copy of it. We assured him that we had no copy and that it was only a rough draft, on which we had asked him to make such changes as would meet his views, but on which he had declined to make any suggestions or enter into any conference whatever in relation to the matter. He, being pressed for the paper, agreed to have a copy made and return the paper at once.

192 At half past six he returned the typewriter's copy to us, saying that he should keep the original and that all negotiations were off, so far as he was concerned." That is a copy of what he returned to us.

X 71 Q. I dislike to have to repeat my question, Mr. Wescott, and I think by this time you might give a direct answer. Did you in your affidavit on the 28th of January, 1890, say that the document you set out was a copy of the contract?

A. I did.

X 72. Will you please annex to your deposition as Exhibit D a copy of the contract as set forth by you in your affidavit of that date?

(Copy produced and marked "Exhibit D.")

X 73. After the execution of the instrument which was signed by all of you on December 14, did you have any discussion with your coplaintiff or your associates in the enterprise with reference to the payment of $60,000 in money to Mr. Mulvane at that time and before the delivery of the stock?

A. We had a conference on Monday, immediately on my arrival in town; I have before stated that.

X 74. I am talking about a conference with your associates?

A. Yes; with my associates, with reference to this particular money.

X 75. State all of that conference?

A. The conference was, that we had made an agreement with Mr. Mulvane to pay him $60,000, and that he wanted a check on New York or a draft on New York.

X 76. Did he state, by the way, that he wanted it then; had some use for it in New York?

A. He did not state that; I assumed that he did, because it went without saying, and as soon as we had completed the supplemental contract we could go to the bank for the money and pay it over to

him. Mr. Potter said the money was there and directed his cashier to pay me the money and take my receipt for it.

X 77. Was that all that was said at that conference?

A. At the bank?

X 78. Yes, sir.

A. Yes, sir.

X 79. Then, that is not responsive to my question. I asked you if there was any discussion as to the advisability of paying him this money; any discussion as to his solvency?

A. I asked Mr. Hanson if he had seen Mr. Burr with regard to the solvency of Mr. Mulvane, as to the propriety of paying him $60,000 on his signature, and he said no. Then I said: "I will at once go and see Mr. Burr and see what he says in regard to Mr. Mul-
193 vane." I went over to the Bank of North America and had a conversation with Mr. Burr.

X 80. And thereupon declined to pay the $60,000 in money against his receipt?

A. I declined to pay him $60,000.

X 81. I say, to him?

A. Yes, to him.

X 82. You said in your direct examination, Mr. Wescott, that the stock of the water works Co. was transferred to other parties after you brought your suit; did you make that statement on your personal knowledge?

A. No, sir; I did not; I so understood it.

X 83. You do not personally know?

A. I do not know anything about what occurred at Topeka.

X 84. Up to the time that the agreement Exhibit — was made, being the one which you all signed, had you disclosed to Mr. Mulvane the fact that any one was associated with you in this enterprise except your coplaintiff?

A. Yes, sir; we went over all that matter in Topeka, showing Mr. Mulvane what we had done in Springfield, Mo., by the actual purchase of that plant, and that it was in practical operation, and also that we were in negotiation for other plants and had a syndicate of gentlemen who were connected with us, of which we were two of the principals. I gave him the address of the Casco bank, Portland, Maine, as to my ability to carry out any agreement into which I entered.

X 85. I am not asking you about that, but as to anything you said to him in regard to your associates in this enterprise.

A. Yes, sir.

X 86. Did you name any of them?

A. I think not.

X 87. What is the nature of that syndicate, Mr. Wescott?

A. The nature of that syndicate?

X 88. Is it a corporation or a private concern?

A. A private concern.

X 89. Is it in the nature of a partnership?

A. No, sir, associates. For instance, a few gentlemen come together and say, "We will purchase"—gentlemen say to me, "Mr. Wescott, if

you will negotiate for water works and operate them, on the condition that you will buy them and operate them, we will go in with you to furnish our portion of the money with you to purchase any plants that you will recommend." On that understanding I went ahead and purchased, as we supposed, the Springfield and also the Topeka.

X 90. Each member of that syndicate had an interest proportioned to the amount he put in?

194 A. He did; the bank, however, agreeing to furnish the money.

X 91. I do not care about the details; there was, you say, no written agreement?

A. No written agreement.

X 92. No arrangement as to liability?

A. No arrangement as to liability except each man was liable for his interest which he had in it.

X 93. Be kind enough to state the names and residences of the gentlemen interested in this particular enterprise, to wit, the Topeka.

A. In this particular one there was Mr. Asa P. Potter and myself, George P. Wescott, and Samuel Hanson.

X 94. Mr. Potter and Mr. Hanson, I believe, are citizens of Massachusetts and you of Maine?

A. Yes sir.

X 95. What was the amount of interest of Mr. Hanson?

A. Mr. Hanson's interest would be 15 per cent.

X 96. Yours.

A. 25.

X 97. And the balance?

A. 60.

X 98. Mr. Potter's?

A. Yes.

X 99. Mr. Wescott, when you met Mr. Mulvane for the purpose of having him sign the final contract, I want you to state fully what discussion took place as to the payment of $60,000 then.

A. Mr. Mulvane had already declined to sign the contract which Mr. Hanson had previously asked Mr. Mulvane to sign, and after I came in the talk was desultory throughout; for a long time we tried to find his objections, why he was not willing to make out a supplemental agreement—he having made his agreement of Saturday, why he should not complete the supplemental agreement on Monday at once. At no time did Mr. Mulvane ask for $60,000 on Monday.

X 100. Do you mean to say you did not discuss the question of the payment of that $60,000 with him at that time?

A. It was alluded to in room 63 only, as my recollection is, and grew out of conversation like this. I said, "Well, Mr. Mulvane, you declined to make this agreement with Mr. Hanson this morning and you declined to discuss with me its provisions and correct it so that it would be satisfactory; now what am I to understand?" Well, he said it didn't suit him. Then he inquired if I had seen Mr. Burr; I told him I had. I had just come from there, and he wanted to know if we were ready to make the payment of the $60,000. I told him

we were ready to pay it; he could have a New York check at
195 any moment the agreement was completed, when the agreement was ready. "Now, then," I said, "in the line of what Mr. Burr has said, don't you think it would be fair for you to put up the stock before we make the payment?" That he said he couldn't do because the stock was in Kansas.

X 101. You knew that fact, didn't you?

A. I did; that is, this was a transaction that was not completed in twenty minutes; it was not to be completed until Monday, but he said that he could put it up in three days' time.

X 102. Did you not decline to pay him any money unless he did put the stock up?

A. No, sir, I did not; I had no opportunity for declining.

X 103. You say that if he had signed the agreement you would have paid him the $60,000?

A. If he had completed the agreement.

X 104. If he had signed the agreement?

A. If he had signed the agreement I would have done it. That is provided for in the Saturday's contract, and if he had demanded his money he would have got it right then and there.

X 105. Just on the signing?

A. Just on the signing; he was entitled to it on the Saturday contract.

X 106. Without a deposit of the stock?

A. Without a deposit of the stock.

X 107. I believe you have stated that you informed Mr. Mulvane that the draft of this agreement had been submitted to him by Mr. Hanson before you met him?

A. Yes, sir.

X 108. In your affidavit of January 28, 1890, did you use this language: "Monday morning I returned to Boston and at 1.30 went to Mr. Mulvane's room, No. 63, on the second floor, and found the same locked. I then went to the Maverick bank and saw Mr. Hanson, who informed me that the money was ready to pay Mr. Mulvane to the amount of $60,000, but he had not seen Mr. Burr, president of the Bank of North America, to ascertain if Mr. Mulvane was responsible and if they would guarantee a payment of the nature proposed to be made to Mr. Mulvane on the signing of the contract. I at once called on Mr. Burr and asked him the standing of Mr. Mulvane. In reply he said that it was the highest possible credit and that he was a thoroughly responsible, reliable party, and he had the fullest confidence in his integrity. I then stated to him that I was to pay Mr. Mulvane $60,000 and asked him if he would be responsible for the honest and safe delivery to us of the stock of the water company, provided we made payment to Mr. Mulvane, as we intended. His
reply was prompt and to the point that he would not guaran-
196 tee the life of any man, which was in effect what I was asking him to do. Further than that, Mr. Mulvane ought not to ask us to do a thing that he would not do himself. He did not believe the transaction was quite such a one as Mr. Mulvane would insist on having carried out. I returned to the Maverick bank at once and

stated what Mr. Burr had said both to Mr. Hanson and to the president of the bank, Mr. Asa Potter. Mr. Hanson showed me a memorandum of agreement which he had prepared for the signature of Mr. Mulvane and myself and stated that he had not submitted it to Mr. Mulvane and was waiting for me to go with him and meet Mulvane, when he would submit the memorandum and allow Mr. Mulvane to make such changes as he desired to make."

X 109. Did you make such a statement in your affidavit?

A. Yes, sir; I want to say that that is——

X 110. You will have plenty of opportunities to make explanations; I do not want to incumber the record. I would like to ask you once more if there was any reason why you made inquiry of Mr. Burr as to the solvency of Mr. Mulvane except the one you have already given, to wit, that Mr. Mulvane requested it?

A. Yes, we also desired for our own information to know his standing; we had seen his rating in the commercial agencies and had seen it in Topeka, and his showing was good. Now, what Mr. Burr might say would reinforce our minds in regard to Mr. Mulvane.

X 111. If stock was to be put against payments what figure did his solvency cut?

A. Well, that was not the fact; up to the time when we made this agreement with Mr. Mulvane and up to Saturday night, when we supposed we had completed the agreement, we had expected and proposed when the agreement was signed to pay him $60 000 in cash if no better arrangement could be made, on his demand, without any condition, and then to take the chance.

X 112. And to see if that was safe you consulted Mr. Burr?

A. No, then we consulted Mr. Burr with regard to Mr. Mulvane, and we tried during Monday to see if Mr. Mulvane would put up the stock.

X 113. Which you knew he could not put up?

A. He could put it up in three days.

X 114. He could not put it up that day if he had signed the contract that day, could he?

A. Well, he could not have got the money anyway by signing the contract up to the time——

X 115. Could he have put up the stock the day you wanted him to sign the contract?

197 A. Oh, no; but had he not declined and demanded his money——

X 116. I am not asking what your mental reservations might have been, but what took place. You did not consult Mr. Burr, then, for the purpose of seeing that it was safe to make that payment?

A. Not until after I had understood he had declined to discuss the agreement which Mr. Hanson had prepared.

X 117. Then this consultation with Mr. Burr was after, and not before, he declined to sign this agreement?

A. After I understood from Mr. Hanson that he declined to sign.

X 118. Was it after you had the discussion with him?

A. Oh, no, sir; before I had seen him.

X 119. It is not my business to afford you an opportunity to mak an explanation, but I will right here. Do you recollect what yo just read from your affidavit?

A. Yes, sir.

X 120. I want to call your attention once more to a paragraph "Mr. Hanson showed me a memorandum of agreement which h had prepared for the signature of Mr. Mulvane and myself, but state that he had not submitted it to Mr. Mulvane, and was waiting fo me to go with him and meet Mulvane." Is that statement true o false?

A. Well, in view of Mr. Hanson's statements here I want to sa this: That I went home from here on the 16th and on the 17th wrote, to the best of my recollection, this affidavit which is signe by Mr. Hanson and myself. Mr. Hanson has already corrected m in several particulars——

X 121. I am not asking about Mr. Hanson's position, but you own. Is the statement there true or false? Did Mr. Hanson mak that statement to you or did he not?

A. At that time, when that was written, that was as I under stood it.

X 122. Now, did you state that Mr. Hanson had not seen Mr. Burr president of the Bank of North America, to ascertain if Mr. Mulvan was responsible and if they (meaning the Bank of North America would guarantee a payment of the nature proposed to be made t Mr. Mulvane on the signing of the contract?

A. Well, on Saturday——

X 123. Did you make that statement?

A. I made that statement. On Saturday——

X 124. Now, if you will just contain yourself and content yourse with answering my questions; I want to get at your statement an then you can make all the explanations you want. Did yo
198 in your interview with Mr. Burr state to him that you wer to pay Mr. Mulvane $60,000 and then ask Mr. Burr if h would be responsible for the honest and safe delivery to us (meanin you and Mr. Hanson) of the stock of the water company, provided w (meaning you two plaintiffs) made payment to Mr. Mulvane?

A. Yes, sir.

X 125. You have said that Mr. Mulvane sulked and refused t discuss the final contract you submitted to him. Did you state i your affidavit that he did discuss the date at which you desired t take possession of the water works?

A. Yes, sir.

X 126. There was, then, some debate on that contract?

A. Yes, sir.

X 127. He did not sulk on that point?

A. Not on that point.

X 128. How long were you in that room?

A. We were there from 12:30—in the two rooms—until about si o'clock.

X 129. By the way, do you recollect any absolute twenty minute interval in which not a word was said?

A. I think at one time Mr. Mulvane stood in the bay window of No. 304—I don't know; it was a long time; it was more than ten minutes.

X 130. There were several of those eloquent fits of silence, were there not?

A. He simply stepped to the bay window, out of sight behind the curtains, and done it repeatedly, ten minutes at a time.

X 131. Ten minutes at a time, several of those intervals?

A. Yes, sir.

X 132. None of you saying anything?

A. None of us saying anything.

X 133. After he made the objection to the date of the delivery did you suggest taking possession after delivery of all the stock?

A. Yes, sir.

X 134. Did he object to that?

A. He made no reply whatever.

X 135. Gave no sign?

A. No; no sign whatever.

X 136. Didn't show what he thought about it?

A. Didn't say what he thought about it at all.

X 137. Did you state to Mr. Mulvane that you desired to know before meeting him that day whether Mr. Burr would guarantee the delivery of this stock?

A. I think not.

X 138. Did you state to him that you desired to see Mr.
199 Burr, before meeting him, Mulvane, for the purpose of asking Mr. Burr if he would guarantee the performance of the contract?

A. No, sir.

X 139. Did you in your affidavit make this statement, referring to a conversation with Mr. Mulvane at this final conference: "In conversation we told him that we had had a conference with Mr. Burr in regard to his standing and business integrity, which we explained had been made necessary because the bank closed at two o'clock and we wished to know before meeting him whether Mr. Burr would guarantee a performance of the agreement, which Mr. Mulvane had said to us Saturday evening that Mr. Burr would do." Did you or did you not make that statement in your affidavit?

A. I did; yes.

X 140. Now you say that you did not say to Mr. Mulvane that you desired to see Mr. Burr before you saw him, Mr. Mulvane, to ask him if he would guarantee a performance of this contract?

A. We saw him after Mr. Mulvane's request that we should do so; it came from Mr. Mulvane that we should see him.

X 141. I have understood that a great many times, but you did not say that to Mr. Mulvane.

A. No, sir; that is, I did not say it on Saturday; it was said to him on Monday.

X 142. I ask you on Monday?

A. On Monday, yes; I did not understand your question, Mr. Williams, just; I want to place myself right on this; I stated this to

Mr. Mulvane on Monday; now, I understood your question was that it was a condition of the agreement of Saturday that I should do it.

(Interrogatory 140 read.)

A. In fairness, Mr. Williams, I am not trying to evade anything if I know what is right; I did state that to Mr. Mulvane on Monday; now, I would like to have the previous question read.

(Interrogatory 139 read.)

A. That is just as I understand it.

X 143. During this interview in regard to the final contract submitted I believe you said Mr. Mulvane sulked and very little was said?

A. Yes, sir.

X 144. And that he did not give any reasons for not signing the contract at that time?

A. Yes, sir.

X 145. Did you state to Mr. Mulvane—now, this was at the time when you were at this final contract, not Saturday, but Mon-
200 day—did you state to him that Mr. Burr had given him a high recommendation for integrity and financial ability, but was not willing to guarantee the safe delivery of the stock?

A. Yes, sir.

X 146. And did you also say to him that he, Mr. Mulvane, should not ask you to pay this money until the stock had been put up against the money in the hands of some bank or a responsible person?

A. That I stated to him was the statement of Mr. Burr.

X 147. You did not state it yourself, then?

A. Not as my statement, but as the statement of Mr. Burr.

X 148. Did Mr. Mulvane then say to you, "I understand you will not put up the money unless I put up the stock, and this means more delay"?

A. No, sir; he did not state it in that way; that is, he said this: "It is impossible for me to put up this stock without three days' additional delay," and he says—well, I will say he did; it amounts to that.

X 149. And he also said that he understood you would not put up the money unless the stock was put up?

A. We asked him why he objected to putting up the stock, and he said it meant additional delay.

X 150. Well, did he say to you: "I understand you will not put up the money unless I put up the stock"?

A. I don't remember that that was said in that way.

X 151. Still, you had some conversation on that subject then?

A. We asked him what objection he had to putting up the stock, and he said it was the additional delay; the money was never refused Mr. Mulvane.

X 152. My question was if he said to you: "I understand you will not put up the money unless I put up the stock, and this means more delay"?

A. That may have been said, but I did not refuse to put it up.

X 153. You did not refuse to put it up?

A. Because no absolute demand was made.

X 154. You say you did not refuse to put it up?

A. No.

X 155. Did you say, either you or Mr. Hanson, or both of you, at that time, that inasmuch as Mr. Burr would not guarantee the carrying out of this contract, you must insist on some security?

A. Yes, sir; we said that.

X 156. Did Mr. Mulvane then say to you that that was an evasion of the contract?

201 A. No, sir.

X 157. Did he take the ground at that time that was an evasion of the contract?

A. No, sir.

X 158. This was Monday I am talking about.

A. Monday, yes.

X 159. In your affidavit of January 28th, 1890, being the affidavit used by your counsel on the preliminary hearings in this case, did you use this language: "I informed him (Mulvane) that Mr. Burr had given him a high recommendation for integrity and financial ability, but he was not willing to guarantee the safe delivery of the stock agreeable to the terms of the contract provided for, and didn't think that Mr. Mulvane should ask us to do so until the stock had been put up against the money in the hands of some bank or responsible person. Then he, Mulvane, said: 'I understand you will not put up the money unless I put up the stock, and this means more delay.' We replied that as Mr. Burr would not guarantee his doing so we must insist on some security. He took the ground that this was an evasion of the contract and that we ought to pay the money to him, because he was responsible."

A. Yes, sir; that is in the affidavit.

X 160. Did he state at that time that he thought the recommendation Mr. Burr had given him was ample and all that had been contemplated and expected by him at the time of your interview on Saturday, and that he expected you would pay him the money on the recommendation given by Mr. Burr?

A. Yes, sir.

X 161. And did you decline to do it, either you or Mr. Hanson?

A. No, sir.

X 162. Did you state to him that he should not ask you to do what he would not do himself?

A. No, sir; that was Mr. Burr's statement.

X 163. In your presence?

A. Mr. Burr stated it to me and I stated it to Mr. Mulvane; it was not my language.

X 164. It was you that made the statement to Mr. Mulvane on the strength of what Mr. Burr had said?

A. Yes, sir; it was not my language.

X 165. I will ask you if Mr. Hanson did not say at this interview that Mr. Mulvane ought not to ask you to do what he would not do himself.

A. I don't remember, sir, that he did.

X 166. Did Mr. Mulvane say to you that afternoon, either at the first interview or the last one, about half past five, that he was satisfied that you could not raise the money?

202 A. That was Monday afternoon.

X 167. Yes, I am talking all the time about Monday afternoon.

A. Yes, sir.

X 168. And that he declared the whole thing off?

A. Not at that time; this statement was made about two o'clock in the afternoon and he declared the whole thing off about six.

X 169. Well, that was the time he said he believed you could not raise the money, was it not?

A. No, sir; he said that about two o'clock in the afternoon, and it was six o'clock before he said that the whole thing was off.

X 170. It was two o'clock when he said he didn't think you could raise the money and about six when he declared the whole thing off?

A. Yes, sir.

X 171. I will ask you if you stated in your affidavit the following: "Mr. Mulvane left the room, and when he came back, about half past five, he said that he was satisfied that we could not raise the money and consequently he had determined to declare the whole matter off." Did you make that statement?

A. Yes, sir, I did make that statement; I was mistaken before; it was not in 63, it was in 304.

X 172. Then it was made?

A. It was; yes, sir.

X 173. You stated that you prepared a statement in this case immediately, and submitted it to counsel. How soon after your final interview with Mr. Mulvane did you prepare that statement for your counsel?

A. I prepared it on the next day; on the 17th of December the statement was prepared.

X 174. And submitted it to him when?

A. The latter part of December; I brought the statement the next time I came to Boston and showed it to Mr. Hanson, and told him what I proposed to do.

X 175. I just want dates now, that is all.

A. The latter part of December.

X 176. When did you submit the matter to Rossington, Smith & Dallas?

A. I could not tell you, sir, the date.

X 177. The bill was filed on the 5th of February; now, about what time did you submit the matter to them?

A. I don't remember, sir; it was some time in January.

X 178. I am talking about Rossington, Smith & Dallas.

A. I don't remember, sir; it was some time in January; it went from here by express with all the data; it was sent by Wells & Fargo express from here the latter part of January.

203 (It was agreed by counsel that the bill was filed immediately after receiving the papers.)

X 179. Where was this bill which was filed prepared, Mr. Wescott? Here or in Topeka?

A. In Topeka, I presume; I had nothing to do with it.

X 180. You did not send any prepared bill out there?

A. No, just sent the affidavits—statements.

GEO. P. WESCOTT.

Redirect examination.

By Mr. SMITH:

Int. 74. You have referred, in your cross-examination, Mr. Wescott, to a supplemental agreement or contract; is that the agreement which is referred to in the contract for sale, that was signed on the Saturday previous?

A. Yes, sir.

75. Now, will you explain what the understanding of the parties was as to this supplemental contract or agreement? Was there any change in it except as to the amount of consideration mentioned in it?

A. No, sir; not that I know of.

76. Then the agreement you refer to is the final agreement, or supplemental agreement, according to your view, referred to in the contract where it says: "The sum of $60,000 to be paid in cash on the signing of a contract to be made and entered into as of this date, the consideration named in said contract to be $440,000"?

A. Yes, sir.

77. Did Mr. Mulvane at that time state any reason why he wanted this new consideration put in this contract to be signed when the money was to be paid?

A. He did; we understood when we closed the contract Saturday evening, and thought we had closed a final contract which was to perform the agreement, that that was a private contract with Mr. Mulvane and of such a nature that he did not wish to show to any stockholders or associates who might ask to see it; therefore, in order to meet Mr. Mulvane's views, we consented to change the consideration in the contract to be signed. He insisted on putting in a clause that we should sign a supplemental contract with a change of the consideration to $440,000.

78. Did Mr. Mulvane make a demand upon you at any time during Monday for the payment of $60,000, or did you at any time on Monday refuse to make a payment of $60,000 to him?

A. No, sir; he did not demand it, nor did we refuse to pay it.

204 79. If he had signed a contract wherein the consideration was expressed at $40,000, and demanded as a matter of right that you immediately pay him after the signing of that contract the sum of $60,000, would you have paid it to him on Monday?

A. I should.

80. Did he at any time during the interview on Monday make any suggestion with reference to the drawing of a contract of the kind mentioned in the articles that were signed on the 14th?

A. I think not.

81. Can you state from what occurred at the various intervie on Monday whether Mr. Mulvane came there for the purpose of g ting $60,000 and executing the contract, or for the purpose of n getting any money and evading the contract previously made?

A. My understanding of the Monday's conversation and of M Mulvane's conduct on Monday was that his whole efforts on Mond was how not to get $60,000 rather than how to get it.

82. What was your financial condition at this time, Mr. Wescot How much were you worth?

A. I was worth on Saturday, the 14th day of December, 1889, mo than $250,000 above all liabilities of every nature whatever.

83. If it had become necessary for you personally to procure $60,0 on that day could you have done so?

A. I could have done so. I had more than $200,000 of collater that I could put my hand on, and I could have raised the mon here in Boston or in Portland at a day's notice myself.

84. You were about to explain a discrepancy between a statem contained in your deposition as taken here and a statement contain in your affidavit that you made at the time this bill was original filed when you were stopped by the counsel who was cross-exam ing you; if you desire to make any explanation of that kind y may now do so.

A. The conversation which I had with Mr. Burr resulted so d ferently from what I had anticipated, from the fact that Mr. Bu knew nothing whatever of Mr. Mulvane's intentions here, and fr the fact that it developed that he was a stockholder in the prope and was desirous of saying nothing about Mr. Mulvane because his personal relations, it placed rather a new phase on the negot tions, and when I returned from the bank I was somewhat in has because we were behind time, and my recollection of what Mr. Ha son told me was as stated in the affidavit which I signed and whi he signed. Afterwards, after the papers had gone forward, in ta ing the thing over I became satisfied that the statement here shou have been modified.

205 85. Statement where?

A. In my affidavit, which is as follows: "Mr. Hans showed me a memorandum of agreement which he had prepar for the signature of Mr. Mulvane and myself, but stated that he h not submitted it to Mr. Mulvane, and was waiting for me to go w him and meet Mulvane."

86. How do you want that statement to stand?

A. I desire to say that Mr. Hanson had seen Mr. Mulvane, as afterwards informed me, and with this agreement, before I h seen him.

87. With whom did you take counsel as to your rights under t contract as signed?

A. Symonds & Libby.

88. Who are Symonds & Libby?

A. They are attorneys in the city of Portland; Mr. Symonds

ex-judge of the supreme court, and Mr. Libby has been county attorney for Cumberland county.

89. I wish you would examine this letter, purporting to be signed by Mr. Symonds.

A. Yes, sir; I have read it over.

90. When did you first consult Mr. Symonds?

A. The latter part of December; I think it was a little before Christmas.

91. And he gave you counsel upon your rights?

A. He did.

92. What occasioned any delay in your acting upon his counsel?

A. There were two things; the death of my sister, which occurred on the first day of January, and the illness of myself from the grip, with which I was taken in Judge Symonds' office while I was in consultation on this same matter; I was laid up in the house for some four weeks by reason of it—during the whole month of January.

93. Were you advised of the sending of a letter by Mr. Symonds to Mr. Mulvane?

A. I was.

94. Do you know as a matter of fact to whom that letter was sent, and how it was sent?

A. I do.

95. How was it?

A. It was addressed to Mr. Mulvane at his office in Topeka.

96. Was that written by you or Mr. Symonds?

A. Written by Judge Symonds.

97. Did you ever receive any letter from Mr. Mulvane after his leaving Boston?

A. No, sir; I did not.

GEO. P. WESCOTT.

206 SAMUEL HANSON, a witness on behalf of the complainants, being duly sworn, testified as follows in answer — interrogatories propounded by Mr. Smith, of counsel for complainants.

Int. 1. What is your name, age, place of residence and occupation?

A. Samuel Hanson, connected with the bond department of the Maverick bank.

2. Are you one of the complainants in this suit?

A. I am.

3. When was your attention first attracted towards the Topeka Water Supply Co. property?

A. Well, I had known something about it for a year prior to the time of my first visit.

4. When was that?

A. My first visit was about the first of October, 1889.

5. Have you ever made a personal inspection of the property?

A. Yes.

6. When and under what circumstances?

A. The first time that I inspected the property was, as I say, about

the first of October, 1889; I started West with Mr. Wescott for the purpose of inspecting the works in several cities, amongst them Topeka; after going to other places I left Mr. Wescott and alone went to Topeka; I went all over the city; I inspected the plant of the company, and I finally went into the office of the company and introduced myself and met a gentleman whom I learned was, I think, Dr. O'Brien, the secretary or treasurer of the company, and I asked him if the works were for sale; he said that he himself was in favor of selling them; he thought it was doubtful whether the president of the company would sell, but referred me to him, Mr. Joab Mulvane; I called upon Mr. Mulvane, and had quite a long conversation with him; he talked about what I had seen and the value of the property; and seemed quite willing to give me what information I required in addition to that I had already gained, so that by the time our conversation had continued some little time I felt pretty well posted in my own mind as to the value of the property; I then asked Mr. Mulvane if he wished to sell; he told me that he would; I asked him what he would sell for; then we had a discussion in regard to the value of the property; the result of it was that he told me that he would not say absolutely on that day that he would sell at such a price, but if I was disposed to offer him $500,000 he thought it would be accepted; I told him that I was not then and there in a position to make him an offer; that Mr. Wescott, who had been with me and had left me, much to my regret,
I could not reach because he had returned to the East,
207 but I thought I could get Mr. Wescott to come out and make
an examination of the property; I reported to Mr. Wescott and also to Mr. Potter the result of my visit in Topeka, I think quite in detail; I told them I had seen Mr. Mulvane about it; it was some little time after I left Topeka before I returned to Boston; I went as far West as Denver; but on my return to Boston, on further consultation with Mr. Potter and Mr. Wescott, it seemed that if Mr. Wescott's examination of the property should corroborate what I said and his views should be the same as those I had expressed, the purchase would be a very desirable one; Mr. Wescott and myself, therefore, started West; we went to Topeka and had an interview with Mr. Mulvane; we found him in quite the same frame of mind that he was when I saw him, quite ready to let us make an examination of the property; we wished to go and see the books of the company; Mr. Mulvane said that we certainly could do so, but he did not wish us to let Dr. O'Brien know that he proposed to sell the property; that there had been some talk about issuing bonds, and when we went there, if the matter was spoken of, we were to appear to be there for the purpose of purchasing the bonds; Mr. Wescott and I then made an examination of the books of the company; we found things substantially as we had expected; we examined the plant, and were driven about the city by Mr. Shaw; Mr. Shaw was mentioned to us by Mr. Mulvane as a man who was in the employ of the company, and who would be, in his judgment, the most capable man we could find as superintendent in case we purchased the works; we then had conversation with Mr. Mulvane in regard

to the price at which he would sell; we offered first $400,000, then $450,000, and we kept on; still he would not change his mind, and finally it was agreed that we would pay, substantially as Mr. Wescott has stated, $500,000; we then had an interview in the back office of the bank, as Mr. Wescott has stated it, and considered that the matter was closed; we returned East; the next we heard from Mr. Mulvane was the correspondence which Mr. Wescott has referred to today, and in due course of time Mr. Mulvane came to Boston; we met him at the Parker house and we expected to take the matter up exactly where it had been left and complete the matter, but he stated that he could not sell us the property then for $500,000; that he must have more money; that he had, in the meantime, succeeded in obtaining all of the stock excepting $12,000, but that every share that he had obtained cost him more than par, and that he must have more money from us. We demurred. We understood that the agreement was made out there; we thought the understanding
208 was complete; we had reported to our friends that the price was $500,000, and we demurred. The conversation lasted until late into the afternoon.

7. This was on Saturday?

A. This was on Saturday; and Mr. Wescott and I, upon consultation, decided that we had been to Topeka; we had examined the works; we had had a perfect understanding in the matter; we had come to his terms, which was perfectly and thoroughly understood, and that it was only fair and right that the matter should be continued in exactly the same line in which it had been all the time, and we so told Mr. Mulvane; that we considered that we had bought the works; that he was merely coming here to complete the transaction, and that was as far as we could say. We put on our coats and were going out of the door, and Mr. Mulvane says: "Well, how does this leave the matter?" I replied that of course the matter was not closed on that day, it was left open. He said, "Very well, come back." We came back and wrote the agreement which has been referred to here today.

8. Who drew the agreement?

A. Mr. Wescott. The agreement was drawn by Mr. Wescott; I drew a copy of it, it was duly signed, and when Mr. Mulvane affixed his signature, he said: "There, now you have my signature, which you did not have before." We certainly considered that the whole affair was terminated and ended there. In the agreement that was made and signed, reference was made to a collateral agreement which should be made on the following Monday. When Monday morning came I sat down to draw that agreement, and for the life of me I could not tell what I could say different from what we had said. It seemed to me that everything was done; I did not know what sort of an agreement to draw up unless I drew a fac-simile of what we had signed. So I went up to the Parker house and I found Mr. Mulvane in the writing-room writing, and said: "Mr. Mulvane, when I came to look over the document we had signed, for the life of me, I don't know what we have got to say; everything is there, as far as I can see; but if you want anything different, suppose you

draw the agreement." "No," he says, "you do that." I said, "I really don't know what to do" He says, "You do that." So I came back to the bank and I drew the paper.

9. What time in the day was this?

A. This may have been half past ten or eleven o'clock in the morning. That draft I took up to Mr. Mulvane to see if it met with his approval. He looked at it, and he says, "That is not right." I said, "What is there that you wish changed?"

10. Was Mr. Wescott with you at this time?

209 A. Mr. Wescott had not arrived then. Mr. Wescott was on his way from Portland; I said, "What do you want, Mr. Mulvane?" "Well," he said, "that is not right." "Well," I said, "won't you draw it and put it in whatever way you want it?" "No." "Well," I said, "won't you come down to the bank and see Mr. Potter? I am sure that you and he together will have no difficulty in arranging this matter." No, he wouldn't. "Well," I said, "I should personally like to have you see Mr. Potter very much indeed." Well, he didn't know; it was a good ways to go. I said, "I will get a carriage and take you down." No, he wouldn't go. I went back to the bank and reported that interview to Mr. Potter; Mr. Wescott arrived and we came up to meet Mr. Mulvane; we had a draft of this agreement and we submitted it. It did not meet with Mr. Mulvane's approval; we had some conversation backwards and forwards and suggestions were made; Mr. Wescott made changes in that agreement; I think there were changes made several times; and we constantly asserted that it was our desire to do almost anything he wanted; that the main points were entirely covered and that matters of detail were of no consequence to us. Finally Mr. Mulvane said that he disavowed the whole thing, the whole thing was off, and rose to leave the room; I would say, however, that we probably remained in the room an hour and a half and I have not the slightest question that several lapses would be as long as twenty minutes without a word being said; he finally left the room, taking this contract with him; we called him back and asked him if he would not give us the draft of the contract. He declined to do so, but finally, upon our insisting, he said he would give us a copy; he went off and we met him downstairs afterwards and he handed us a typewritten document which he said was a copy.

11. Have you ever seen that draft of the contract referred to since the time you gave it to Mr. Mulvane?

A. The one which was drawn by myself originally?

12. Yes, sir.

A. I have never seen it.

13. Well, what else occurred at this interview on Monday between you and Mr. Mulvane and Mr. Wescott?

A. Well, I remember one remark that Mr. Mulvane made. He said that he had been trying to look me up in the directory; that about Mr. Wescott he knew; that he knew of him through various friends and he knew all about him and his responsibility, but he had been looking in the directory and he could not find me. He found that there was a Mr. Hanson connected with the Boston — Albany railroad

and wanted to know if I was the man; I told him no, that I was connected with the Maverick bank; that I was
210 the bond department there and I would refer him to the Maverick bank as to my ability to carry out the contract.

14. What did he say to that proposition on your part?

A. I don't remember that anything special was said.

15. Had you the $60,000 provided for in the contract signed by yourself, Mr. Wescott and Mr. Mulvane, under your control so that it could have been turned over to him at the time?

A. Certainly. Directly that the contract was signed, the following Monday morning, I reported the matter and arranged with Mr. Potter and Mr. Work, the cashier of the bank, for the money.

16. Were you expecting to use that $60,000 that day for that purpose?

A. I was; I supposed, of course, it would be paid.

17. Had you made any arrangement with Mr. Work, the cashier, to remain at the bank until after banking hours for the purpose of turning over the check?

A. I personally had not, but I understand it was done.

18. Do you know of such an arrangement being made?

A. I understand the president requested him to remain.

19. Do you know whether he remained there or not?

A. I have always understood that he did, but of my own knowledge I do not.

20. What reason, if any, did Mr. Mulvane give for his conduct on Monday?

A. I could not tell you what reason he did give; Mr. Wescott and I talked the matter over and we said that we could not see what Mr. Mulvane wanted; we failed to see what the matter was.

21. Did he make any demands upon you that you failed to comply with at that time?

A. None that I remember now.

22. Did he offer any suggestions about changing the form of the contract, or the terms, or the phraseology?

A. Nothing except that which we were instantly ready to agree in as far as we could in keeping with the contract which was already made.

Cross-examination.

By Mr. WILLIAMS, of counsel for defendant:

X 1. What amount of money was to be paid in cash, according to your preliminary talk in Topeka?

A. You mean when Mr. Wescott and I met Mr. Mulvane there?

X 2. Yes, sir.

A. I don't know that I recall.

X 3. Was it not $50,000?

211 A. Yes, there was talk about that, but I don't remember that that was in Topeka.

X 4. Well, wherever it was, that was the amount?

A. Yes, $50,000 was the original amount.

X 5. When you met in the Parker house, as has been testified here, Mr. Mulvane demanded $550,000, and you refused that demand; then he demanded $525,000 and you refused that. Now, was any alteration suggested by Mr. Mulvane as to the amount of the cash payment?

A. There was; it became $60,000.

X 6. I wish you would state what he said about that.

A. I don't recollect anything specially said about that, any more than there was a general discussion as to how all the money should be paid and in arranging the terms of payment, which was stated in the contract at various times, that amount was mentioned, as others were.

X 7. Did he say anything about needing the money at that time?

A. I don't recollect that he stated that he needed any money particularly.

X 8. Did he state that he could make good use of that sum at that time?

A. I think he may possibly have said something of that kind; I think he gave that as one of the reasons for selling the property.

X 9. That he could make good use of $60,000 at that time?

A. Yes, and of the entire amount which we were to pay him.

X 10. I am speaking of the payment now of $60,000 in cash. Did you have $60,000 of your own money, Mr. Hanson, at that time?

A. I did not.

X 11. Were you in a situation to procure for your own use that sum of money?

A. I was in a position to procure for the use for which I had promised $60,000.

X 12. I understand that; I am getting at your financial standing. Could you at that time have procured for your own use $60,000?

A. I cannot say what I might have done.

X 13. What was your financial standing at that time?

A. I was enabled to procure $60,000 in that instance. I cannot say that I could not have procured it in another. Do you mean to ask whether I was worth $60,000.

X 14. I mean to ask, if you will permit me to finish my question, what I have not asked yet: Were you in such a financial condition at that time that you could for your own use, according to the general course of banking business in the city of Boston, procure the sum of $60,000?

212 A. I do not wish to answer that question in the negative, although I might do so under certain circumstances, because, having been in a position where I had command of $60,000 for this purpose, I might have done it in others.

X 15. You are taking a good deal of time unnecessarily. You are in the banking business, I think you said?

A. Yes.

X 16. You know, therefore, the rules that govern banks in making loans?

A. If you wish to know whether I had $60,000 in collaterals I will answer that.

X 17. I will get at my question in my own way. You said you were in the banking business?

A. I said I was manager of the bond department of the Maverick bank.

X 18. That is in the banking business. You are aware of the fact that in making advances to people sentiment does not enter into the matter, but a man's solvency is the only question considered. If you had desired for the purpose of an investment of your own in the West to raise $60,000, were you in such financial condition at the time of this transaction that you could have procured a loan of that amount on the strength of your financial standing?

A. I think that if I had received the property to which I was entitled by the payment of $60,000, I was in a condition in which I could have raised the money.

X 19. I will repeat the question and ask the master to strike the testimony out if I do not get an answer, if I succeed in making it plain. Was your financial standing such at the date of this transaction that you could in the ordinary course of business have borrowed for your own exclusive use the sum of $60,000?

The MASTER: You can answer that irrespective of this transaction and then if you answer "no," you can have an opportunity afterwards to explain that in this particular transaction you could. If you answer "yes," that settles it.

A. My reason for not giving a decided yes or no to the question is this, that a person in making a loan of $60,000 would naturally have some collateral with it; that it would be very easy with collateral or, I would put it in this way, that in order to borrow $60,000 in money one might not necessarily himself be worth $60,000. If you purchase a piece of real estate which is worth a hundred thousand dollars, you may not be worth more than $20,000, but you may be able to borrow $70,000 or $80,000 on that property, while you yourself are not worth over $20,000. I do not wish to make an answer to that question which is prejudicial; if he wishes to know whether I had $60,000 at my own command I will certainly give him an answer.

213

(Question repeated.)

The MASTER: I think, Mr. Hanson, you can give a yes or no answer to that question.

A. On my own promise to pay that amount I don't think I could.

X 20. I will ask you if your financial condition was such at the date of this transaction that you could have purchased and handled a property of this kind?

A. Not without aid; I think I have shown that I would have received the aid that was necessary.

X 21. In this transaction how large an interest did you personally have?

A. My interest would have been 15 per cent.

X 22. How was that interest to be paid for?

A. I don't understand.

X 23. Money or services?

A. In money, in value.

X 24. You were to pay 15 per centum of the purchase price?

A. Of the property.

X 25. Mr. Potter had how large an interest?

A. Mr. Wescott had 25 per cent., I had 15, and Mr. Potter the balance.

X 26. He had a greater interest than both of you?

A. Yes; he would do what he chose with the balance; I don't know how it was to be arranged.

X 27. Did you offer Mr. Mulvane a check for $60,000?

A. We had no reason to offer him a check for $60,000; we were to pay the money when the contract was signed.

X 28. I am not asking your reasons or your argument.

A. No, we did not.

X 29. Did you tender him that amount of money?

A. No.

X 30. Did you at any time have a check for that amount of money payable to his order?

A. I cannot state that one was so drawn.

X 31. If there was no perceptible difference in your mind between the contract which Mr. Mulvane and you had signed and the one which you tendered him to sign why did you not offer him $60,000 under the first contract?

A. Because the first contract stated that a subsequent one should be drawn upon the signing of which the money should be paid.

X 32. That was the only reason?

214 A. That was the only one that I recall now.

X 33. Although you saw no difference between the contracts?

A. In that respect there was a difference.

X 34. There was a difference in regard to the payment of the money?

A. Yes.

X 35. What occasioned that difference?

A. Well, I presume one reason may have been that at the time we signed the contract it was too late to procure the funds that night; it was about six or half past six o'clock Saturday night.

X 36. Had your conference with Mr. Burr anything to do with it? Did that furnish an additional reason?

A. Not to my mind.

X 37. Why did you have a conference with Mr. Burr?

A. I personally had none.

X 38. Why was there any desire to have a conference with Mr. Burr?

A. Mr. Mulvane requested it, suggested it.

X 39. Was that the only motive?

A. I had none myself.

X 40. You were satisfied to pay him the money without a conference with Mr. Burr?

A. We had made an agreement to make the payment at the bank, but as far as that was concerned my mind does not suggest any reason at all.

X 41. Did you have any conference with Mr. Potter in regard to conferring with Mr. Burr?

A. I do not personally recall that I did.

X 42. Were you present at any conference at which Mr. Potter was present when the subject was discussed?

A. I do not remember.

X 43. Did you at any time yourself hear Mr. Potter discussing the question of a conference with Mr. Burr?

A. I do not personally think that I did.

X 44. Did you hear him say anything about the conference after it took place, as to what Mr. Burr had said?

A. I don't remember that.

X 45. Have you ever heard what Mr. Burr said at that conference?

A. Mr. Wescott told me.

X 46. When?

A. I think immediately afterwards.

X 47. Was that before you saw Mr. Mulvane on Monday?

A. No. I had seen Mr. Mulvane twice before I saw Mr. Wescott.

215 X 48. Well, before you and Mr. Wescott together saw Mr. Mulvane had he told you the result of this conference?

A. I think he had.

X 49. The paper which you drafted and showed to Mr. Mulvane in the presence of Mr. Wescott was the identical paper which you subsequently together presented to him, was it?

A. I think so.

X 50. You did not redraft it?

A. I think not.

X 51. Mr. Wescott did not redraft it?

A. No.

X 52. Then the draft was made by you and not by Mr. Wescott?

A. Yes.

X 53. The one which Mr. Mulvane took away and returned what purported to be a copy to you?

A. Yes, sir; think it was in my handwriting; that is my recollection of it.

X 54. Had you communicated to Mr. Wescott before you and he saw Mr. Mulvane together that Mr. Mulvane had rejected that draft?

A. My impression is that I did, but I don't recollect it; that is my impression.

X 55. You very naturally would, of course?

A. Yes.

X 56. I believe you said you offered Mr. Mulvane no money?

A. No.

X 57. Do you know anything about consulting the attorney to whom Mr. Wescott referred?

A. Yes.

X 58. How soon after the final interview with Mr. Mulvane did you lay the facts before his attorney?

A. I could not state that absolutely, because it was not done in Boston.

SAM'L HANSON.

J. HERBERT SHEDD, a witness called on behalf of the complainants, being duly sworn, testified as follows in answer to interrogatories propounded by Mr. Smith, of counsel for complainants:

Int. 1. What is your name, place of residence and occupation?

A. J. Herbert Shedd; Providence; civil engineer.

2. How long have you been following the occupation of civil engineer?

A. I first opened an independent office in 1856; that was in Boston.

216 3. Have you devoted any time or particular attention to the construction of water works?

A. That has been a specialty with me for nearly thirty years, twenty-five at least.

4. Have you ever examined the system of water works in the city of Topeka, Kansas?

A. I never have.

5. From your experience in following your profession are you able to testify as to the value of water-works property?

A. I think I can approximately.

6. Well, from such experience what would be, according to your estimate, the value of a water plant in a western city having 45,000 people, with 36½ miles of iron pipe, laid with proper laterals, &c., with 290 fire-hydrants set, and proper sizes of pipe for supplying water for distribution for domestic and fire purposes, with two Holly quadruplex engines of 3,000,000 gallons capacity, and one Holly-Gaskill horizontal compound condensing engine of 4,000,000 gallons capacity each twenty-four hours, with ample boiler capacity, with the pumps, with plenty of water, with a consumption of water in the city of 900,000 gallons per day on an average, with an extended pipe system, so that an additional income of say, 25 per cent., or $14,000, could be secured without any great expense other than laying service pipes, having, say, an income of $56,000, to which add 25 per cent. for the extension, making $70,000, with operating expenses of $11,000 and interest charges of $13,000, and with a net income of $46,000? What, in your judgment, would be the value of a plant of that character?

A. It is to be assumed that the works are of a permanent character, not requiring more for renewal than good works require?

7. Yes, sir.

A. I think about $780,000.

8. Does that include the franchise?
A. That includes the franchise.

J. HERBERT SHEDD,
By H. P. DILLON, *Master.*

It is agreed that the foregoing deposition may be signed by the master in behalf of Mr. Shedd, with the same effect as if signed by him.

ASA P. POTTER, a witness called on behalf of the complainants, being duly sworn, testifies as follows, in answer to interrogatories propounded by Mr. Smith, of counsel for complainants:

217 Int. 1. What is your name, place of residence and occupation?

A. Asa P. Potter; Boston; president of the Maverick national bank.

2. Are you acquainted with the complainants, Mr. Wescott and Mr. Hanson?

A. Yes.

3. I wish you would go on and state briefly what connection, if any, with relation to the subject-matter of this litigation you as president of the Maverick bank or the bank itself bore to the transaction?

A. Well, a part of the business of our bank is selling bonds, and a large portion of our business, especially, selling water bonds. We buy bonds of contractors and owners of water works from time to time, and occasionally, it has been necessary or desirable to purchase the entire plant, as we did in the case of the Springfield works. Mr. Hanson is in the employ of the bank and Mr. Wescott is a man that I have personally known for a great many years, and, regarding him as a thorough expert in water bonds and water works, and a man of good business experience and capacity, we have relied upon him to look at the practical part and take charge of the practical part of any work of the latter kind. In this instance we were about buying or negotiating for the Springfield works in Missouri and Mr. Hanson and Mr. Wescott went West for us, Mr. Hanson to consider whether, if the property was bought under proper terms, we could sell the bonds, and Mr. Wescott to determine whether the works could be bought at a price within Mr. Hanson's judgment. We relied, in fact, upon his practical knowledge entirely. While they were on that trip they went to several places and among others to Topeka. Mr. Hanson wrote me, or telegraphed me, that they were going to Topeka. On their return from Topeka Mr. Hanson reported to me the conversation or interview he had with Mr. Mulvane, substantially, as Mr. Wescott has testified to here, and then as letters came from Mr. Mulvane to Mr. Wescott they were sent to me. I saw them and kept cognizant of the fact that the trade was in train and would be consummated and carried out. At the time Mr. Mulvane came here I did not see him. I did not see him because I do not recall that I knew that he was here until the day that Mr. Wescott came to Boston and he and Mr. Hanson met him. They

left the bank to come here, and, after their interview, I suggested to Mr. Hanson that I would like to see Mr. Mulvane, like to meet him, and he said he would ask him to come down to the bank; otherwise I should have come here to see him. Mr. Hanson left to ask him to come down to see me. He did not come. That was on
218 the day that they had their interview and signed the contract to purchase the works, on Saturday.

4. What arrangement was made by Mr. Hanson and Mr. Wescott with you or with your bank with reference to procuring the funds to meet the payments as they fell due under the terms of the contract?

A. They reported to me, either one or both of them, the terms of the contract. I said it was entirely agreeable to us and we would furnish the money and the money was ready. I don't remember just what day it was that the $60,000 was wanted, but I presume from the testimony it was on Monday that Mr. Hanson spoke to me and I said of course they could have a New York check the same as they could have Boston funds; it made no difference to us.

5. The funds were there subject to the control of Mr. Hanson and Mr. Wescott, were they?

A. Oh, yes, sir; I told the cashier to give them a check when they asked for it.

6. Do you know whether or not Mr. Hanson or Mr. Wescott would have been able to meet the payments as they fell due?

A. We should have furnished the money.

7. Was an arrangement of that kind made?

A. Certainly.

Cross-examination.

By Mr. WILLIAMS, of counsel for defendant:

X 1. You were, then, as I understand, Mr. Potter, to furnish all the money for this transaction?

A. Yes, sir.

X 2. The Maverick national bank is an incorporated bank, is it not?

A. Yes, sir, a national bank.

X 3. Incorporated under the laws of the United States as a national bank?

A. Yes.

X 4. Is it otherwise incorporated?

A. No.

Redirect examination.

By Mr. SMITH:

Int. 8. Mr. Potter, after your interview with Mr. Wescott and Mr. Hanson on December 16, did you procure from any person here the address of Mr. Mulvane?

A. I did; yes, sir.

9. From whom?

A. From Mr. Burr, of the Bank of North America.

10. What did you do after obtaining his address?

219 A. I wrote him a letter; Mr. Hanson told me that Mr. Mulvane had left word that any communication could be addressed to him, or his address could be found, at the Bank of North America. I went to the Bank of North America and saw Mr. Burr, and he inquired of his cashier if Mr. Mulvane had gone, and if so, if he had left an address, and he told him that he had left his address as being the Fourth national bank in New York, and I wrote him a letter that day, I think.

11. Have you a copy of the letter that you wrote him that day?

A. Yes, sir; this is a copy of it, I presume.

12. That letter was mailed and postage paid?

A. Yes, sir; that letter was mailed and postage paid, and to be returned if not called for.

13. Has it ever been received?

A. No, sir; it has never been returned.

14. Did you ever hear anything from Mr. Mulvane in response to this letter?

A. I never did.

(A copy of the letter referred to by the witness is here attached and marked "Exhibit E.")

15. Mr. Potter, from your cross-examination am I to understand that the bank was dealing in this capital stock?

A. No, sir; I did not mean to say so; I did not mean to say that the bank was buying the stock. The bank never had bought stock nor did not intend to in that case.

16. What did you intend to say?

A. I meant to say that we were in the habit of buying bonds, that we were large dealers in bonds, that we were dealers in water bonds especially, and that we contemplated buying this issue of bonds when the company should have been reorganized. I meant to say that during the interim we were to furnish $60,000; it was first $50,000 and then $60,000. That was what I meant to say.

17. Is there any other explanation which you desire to make in connection with your testimony?

A. I do not recall any, sir.

ASA P. POTTER.

Indorsed: No. 6448. Testimony. G. P. Wescott *et al. vs.* Joab Mulvane. Filed Mar. 3, 1892. Geo. F. Sharitt, clerk.

The undersigned, Hiram P. Dillon, respectfully states that, pursuant to an order of the court made in the suit of George P. Wescott *vs.* Joab Mulvane on the — day of December, 1890, whereby he was appointed

for the purpose of taking testimony, that testimony was taken 220 pursuant thereto and is filed in this suit; that the exhibits attached to the testimony consist both of the original papers and copies. Where copies are attached it is by agreement of counsel that they shall be of the same force and effect as the originals; and

I certify that wherever a copy is made as an exhibit, it has b
verified and is a correct copy of the original.

HIRAM P. DILLON, *Master*

Master's fees, —.

EXHIBIT "A," WESCOTT'S TESTIMONY.

Joab Mulvane, pres't; M. O'Brien, sec't'y.

The Topeka Water Supply Company. Office, 111 East Seve
street.

TOPEKA, *Nov.* 13, 188

Whereas, Joab Mulvane, Esq., of Topeka, Kansas, and his a
ciates, own the stock of the Topeka Water Supply Company, s
Mulvane owning, in his own right, a majority thereof, and be
disposed to sell his stock and to advise his associates to sell th
stock in said company, on the terms and conditions hereinafter stat
and whereas, Geo. P. Wescott, of Portland, and Samuel Han
and associates desire to purchase the capital stock and property
said water company, it is hereby agreed that said Wescott and Han
will pay said Mulvane and associates par for said stock and to pa
Joab Mulvane, Esq., the further sum of one hundred thousand
lars for the control and carrying out of the above sale and transfe
said stock to said Wescott and Hanson, delivery thereof to be made
New York or Boston, as said Mulvane may elect. Said Mulvane,
his part, agrees to deliver said stock, amounting to $400,000, par va
on or before January 1st, 1890, and also to perform such services
the formation of a new company, if one is required, to be perform
as said Wescott and Hanson may require to be done.

(Signed) GEO. P. WESCOTT
SAMUEL HANSON

EXHIBIT "B," WESCOTT'S TESTIMONY. H. P. Dillon, Master.

Engineer's Report.

To Messrs. Coffin & Stanton.

GENTLEMEN: I beg to submit to you the following report on
water works of Topeka, Kansas, as embodying the results of my
amination of said works, as per your instructions:

The city of Topeka has at present a population of at least 45,0
not including several suburbs that are not as yet incorpora
221 with the city. It is located on the Kansas river, 66 miles f
Kansas City, in the midst of a fine agricultural country,
is growing very rapidly, both in wealth and population.

The principal business is manufacturing and trade with farm
of the surrounding country, and the excellent railroad connecti
both east and west, render it an important centre for distribution
grain and other products.

Railroads.

The railroads are:
The Kansas division of the Union Pacific R. R.
Atchison, Topeka & Santa Fe R. R.
St. Joseph branch of Chicago, Rock Island & Pacific R. R.
Kansas, Nebraska & Dakota R. R.

Conditions of city.

The financial condition of the city is good and its credit high. A large amount of work is now being done on the streets, and several miles of asphalt and block paving have been laid during the past year. The class of houses is uniformly good, and there are many handsome and costly buildings.

Class of works.

The city is supplied with water from works operated by a company organized under the laws of the State of Kansas and operating under a franchise granted by the city of Topeka in 1881. The works were built in 1881–'82 by Messrs. Russell & Alexander, as contractors for the company, and since the date of first construction extensions have been made by the company as the growth of the town required.

The works are what is known as the direct-pressure system, the water being forced by the pumping machinery directly into the mains without first passing through a stand pipe or reservoir. The topography of the site on which the city is built is well adapted for the efficient operation of works of this description, and the low price of coal renders an economical operation of the plant possible. The service rendered at present is good, and the fire protection ample.

Pumping station.

The pumping station is located on the banks of the Kansas river, at the foot of Topeka avenue, and is about a half mile from the center of the town. The buildings are well and substantially built of brick, are neatly finished, and are divided into engine-room, boiler-room and coal-room. They are ample size for future extensions of pumping plant. The smokestack is of brick.

222 The pumping plant consists of two Holly quadruplex engines of a capacity of 3,000,000 gallons per 24 hours, and of one Holly-Gaskill horizontal compound condensing engine of 4,000,000 gallons capacity per 24 hours. These engines are well arranged, are in excellent condition, and are capable of supplying the consumption in the city for many years.

The boiler plant consists of three horizontal tubular boilers of about fifty-horse power each. They are well set, and are ample for the needs of the pumping plant.

Water supply.

The water supply is taken from four open wells sunk near the banks of the river, in a sand and gravel stratum, through which the water filters. These wells are sunk to a depth of about six feet below

the river bottom and are connected by a cast-iron pipe, rendering the entire storage capacity and filtering area available at any moment. There is also a 12-inch connection direct to river for use in an emergency.

The wells are of the following dimensions:

First well	80 feet diameter
Second well	60 feet diameter
Third and fourth wells	18 feet diameter

They are all about twenty-six feet in depth and lined with stone masonry that extends to about eight feet above the surface of the ground, effectually excluding surface water. All are roofed in and provided with proper ventilators. The 80-foot well was the first one built at the time of the first construction of the works, and the other three have been added from time to time as the consumption of water increased.

The sand and gravel stratum in which the wells are sunk, and from which the water is obtained, is found underlying the bed of the Kansas river and the low lands along its banks for many miles both above and below the city of Topeka, and supplies of water are obtained from it at many points. Its depth and thickness vary at different places, but it is usually about eight feet in thickness and is overlain with a deposit of clay or alluvium. It is a very coarse, clean sand mixed with gravel and pebbles, and admits water freely. The water obtained from it does not differ from that of the Kansas river, except that impurities held in suspension have been filtered out. The water is of excellent quality, and suitable for all purposes of domestic or manufacturing use.

It is the only supply available for the city of Topeka, unless water be taken direct from the river, and those who do not use it depend on cisterns and a few shallow wells. I can find no complaint
223 as to its quality among consumers. As to quantity, I consider that the present wells will furnish an ample supply for several years, and additional wells can be sunk at slight expense, increasing the supply indefinitely. The franchise also allows water to be taken direct from the river.

Real estate.

The real estate owned by the company, and on which the wells and engine-house are located, is about nine acres in extent, extending along the river bank some one thousand feet and being from four hundred to five hundred feet in depth. There is ample room for the location of additional wells should they be needed.

Pipe system.

The pipe system consists of thirty-six and one-half miles of pipe.

I have carefully examined the pipe lines and find the system well proportioned for supplying the area at present covered, and that the extensions and additions made during the past few years have been intelligently planned and carried out and add materially to the general efficiency of the system.

Hydrants and valves.

There are at present in use and rented by the city 290 double-nozzle hydrants located on the pipe lines named. The hydrants are of Holly manufacturing, of good pattern.

The valves in use are made by the Ludlow Valve Company.

Extensions.

The first extensions put in should be lines of 12-inch and 16-inch pipe to meet the growing demands of the city and to increase the supply in the area at present supplied by 6" and 4" pipe.

These lines proposed need not all be laid at once, but the improvement contemplated can be extended over several months, the large pipe replacing smaller sizes when put in. On all of these lines a large amount of private consumption can be obtained, and in the outlying districts hydrants will be located as per the terms of the franchise, giving a revenue that will repay the outlay made.

Consumption.

The pumping report for the year 1888, shows a total of 298,393,099 gallons pumped, or an average of 817,515 gallons per day of 24 hours.

This consumption, however, would be varying, and in dry seasons the wells have been called upon to supply at least 2,000,000
224 per day with the present number of consumers. I should estimate the average consumption during the next five years to be from 1,500,000 to 2,000,000 gallons daily, with a maximum at certain seasons of a- least 3,000,000. This supply can be obtained from the present wells.

Should it ever become necessary to do so, an increased supply can be obtained by sinking more wells similar to those now in use by means of a system of tube wells, or by taking water directly from the river and forcing it through mechanical filters. None of these methods would involve serious expense.

Earning capacity.

I submit the following table of receipts for the year- 1886, 1887, 1888.

These various items have been taken from the monthly reports of superintendent, and have been verified by inspections of company's books.

Year 1886, $34,531.33; 1887, $48,279.86; 1888, $56,153.57.

Number consumers, January, 1889, 1,872.

Increase since January, 1888, 9 %.

Amount paid by city at present, $14,110.00.

Number gallons pumped in 1888, 298,393,099.

Cost pumping 1,000 gallons, 4¾ cents.

Average rate paid per consumer, about $25.00.

I would call your attention to the comparatively small number of consumers for the length of pipe lines, and to the large average rate paid by each one. This would seem to indicate that the private

consumption is mainly by well-to-do people, who use water for sprinkling and stable purposes, baths, &c., and that there is a wide field for increased consumption among the smaller property-holders.

It is my opinion that the private consumption could be increased over 24 % on the present line of pipe and the same average maintained by future extensions.

Summary.

1st. In conclusion, I would say I consider the pumping machinery, boilers, etc., in their present condition, equal to the supply of the city for the present and for several years to come.

2nd. That the water supply is ample, can be easily and cheaply increased should it be necessary to do so, and that the quality of the water furnished is good.

3rd. I recommend that in future extensions no small pipe be laid, but that the present long lines of 4-inch be replaced by large pipe and the 4-inch on these lines be taken up and used for minor extensions.

225 4th. That the lines of 16-inch and 12-inch in central part of city be gradually extended, and replace smaller lines now in use.

5th. That the plant is earning an income of at least $56,000 per year, and that this can be increased fully 25 per cent. on the present lines of pipe. A fair estimate for the earnings at the expiration of next five years would be not less than $100,000.

Trusting I have covered all the points on which you desired information as per your letter of instruction,

I am, yours respectfully, E. F. FULLER.

EXHIBIT "C," WESCOTT'S TESTIMONY.

PORTLAND, ME., *Dec. 17th*, 1889.

I, Geo. P. Wescott, of Portland, Maine, make the following statement in regard to the negotiations and transactions had with Joab Mulvane, of Topeka, Kansas, relating to the purchase of the water works of the Topeka Water Supply Company, Topeka, Kansas. Said negotiations being conducted on the one side by the said Mulvane, owning, in his own right, more than a majority of the capital stock of the Topeka Water Supply Company (capital stock of said company being $400,000,) and on the other side by Geo. P. Wescott, of Portland, Maine, and Samuel Hanson, of Boston, Massachusetts.

On the twelfth day of November, in the afternoon, myself and Mr. Hanson were at the office of Mr. Mulvane, in Topeka, Kansas, pursuant to an arrangement made between said Mulvane and Hanson some three or four weeks prior to this date. We found Mr. Mulvane at his office and obtained from him his consent to make such examination of the plant and works of the company as we desired to make.

On the following day it was arranged to meet Mr. Mulvane in the morning and examine the books of the corporation and later to enter

into negotiations for the purchase of the plant. Accordingly we visited the pumping station, on the banks of the Kansas river and made an inspection of the entire city, as we deemed desirable and proper, relating to the standing of the affairs of this corporation.

On the following morning we met Mr. Mulvane and went with him to examine the books of the corporation at the office of the water company. Finding everything in satisfactory condition it was arranged to meet Mr. Mulvane at the hotel after dinner and see if we could agree on the price to be paid for the property. At about half past two Mr. Mulvane came to the hotel, with Mr. Shaw (in
226 the employ of the company). Mr. Shaw having been brought to the hotel at our request, to interview him in regard to the pipe distribution of the company, of its condition, etc. After Mr. Shaw had left the room, negotiations were opened with Mr. Mulvane, at which time Mr. Mulvane expressed a willingness to undertake the purchase of the balance of the capital stock and sell the entire property to us for the sum of $500,000. This sum Hanson and myself deemed too large, and had previously offered him $450,000. Finally this sum was raised to $475,000, which was declined by Mr. Mulvane, and it was agreed that we were to meet Mr. Mulvane at 5 o'clock in the afternoon and would then determine if we would pay the sum asked by him, namely, $500,000, or not.

At 5 p. m. we met at his office by appointment and went into a private room attached to the bank, adjoining his office, and there we agreed to pay him the sum asked by him, namely, $500,000. With that object in view, the following memorandum was prepared for signatures of the parties, which was satisfactory to Mr. Mulvane:

Copy.

Joab Mulvane, prst.; M. O'Brien, sec'ty.

The Topeka Water Supply Company. Office, 111 East Seventh street.

TOPEKA, *Nov.* 13, 1889.

Whereas, Joab Mulvane, Esq., of Topeka, Kansas, and his associates, own the stock of the Topeka Water Supply Company, said Mulvane owning, in his own right, a majority thereof, and being disposed to sell his stock and to advise his associates to sell their stock in said company, on the terms and conditions hereinafter stated; and, whereas, Geo. P. Wescott, of Portland, and Samuel Hanson and associates desire to purchase the capital stock and property of said water company.

It is hereby agreed that said Wescott and Hanson will pay said Mulvane and associates par for said stock, and to pay to Joab Mulvane, Esq., the further sum of one hundred thousand dollars for the control and carrying out of the above sale and transfer of said stock to said Wescott and Hanson, delivery thereof to be made in New York or Boston, as said Mulvane may elect. Said Mulvane on his part agrees to deliver said stock, amounting to $400,000, par value, on or before January 1st, 1890; also to perform such services in for-

mation of a new company, if one is required, to be performed as said Wescott and Hanson may require to be done.

(Signed) GEO. P. WESCOTT.
SAMUEL HANSON. [SEAL.]

227 The foregoing agreement was written out in duplicate, we expecting that Mr. Mulvane would sign one and we the other. We signed ours, as the signatures appear above, but Mr. Mulvane said he could not then sign a paper which bound him to do something which he did not know if he could do or not, but that he would take the matter under consideration and at once obtain the consent of his associates, and within ten days he would send us his paper, duly signed, and we might return ours duly signed, or he would declare the trade off.

At the expiration of said ten days, namely, November 22nd, he addressed the following letter to me:

DEAR SIR: I cannot write you anything definite today. Will write you again, or may see you, as I expect to be in Boston in the near future, and I will advise you when I will go East soon as my broken arm will allow.

Respectfully yours, JOAB MULVANE.

I replied at once that I should be pleased to meet him in Boston any day that he might name and that my address was the Parker house, Boston.

On December 4th, he wrote me as follows:

DEAR SIR: I expect to be in Boston on the 14th inst., and will call at the Parker house, and shall be pleased to meet you.

Please accept my thanks for your courtesy for sending the form for accounts.

I shall be able to talk and act definitely with you as to the business matter heretofore discussed.

May I congratulate you on the triumph of your Mr. Reed for Speaker?

My right arm is yet in limbo and writing is a difficult task.

Respectfully yours, JOAB MULVANE.

December 13th I received the following telegram, dated in Boston:

Will be at the Parker house today and tomorrow.

(Signed) JOAB MULVANE.

I replied that I would meet him in Boston on Saturday, at 11.30 a.m. At 11.30 a. m. I was at the Parker house, and waited until 12.45 for Mr. Mulvane to keep his appointment. At that time he came and explained his delay had been occasioned by a meeting of the
228 directors of his railroad, where he was required to make a quorum. Mr. Mulvane, Hanson and myself retired to room 304, on the second floor, where Mr. Mulvane stated that he now owned in his own right $388,000 of the stock of the Topeka Water Supply Com-

pany, leaving but $12,000 of stock to be acquired, which he expected to have in a very few days, so that then he was in a position to sell and deliver the entire stock, except $12,000, that he had actually purchased the stock and now owned it, but that it had cost him more money than he expected and that he could not sell the stock at the price he had named in Topeka, that he should require at least $50,000 more than the price then named. After considerable talk and our insisting, that while he had a perfect right to declare the transaction off, yet we understood it to be agreed that if he could acquire the stock and it was possible to carry out the transaction, that it would be done at the price named in the agreement of November 13th, and that, inasmuch as he had carried it out and could accomplish it, we certainly felt that the sum which we had then offered should be accepted by him and the stock delivered to us, that he had been acting as our agent in acquiring the stock, and that it should be delivered to us. After considerable negotiation, he finally said that $25,000 additional or $525,000, was the very lowest sum at which he would sell the property, and would require $50,000 paid on account at time of signing the contract. After further conversation, Mr. Hanson and myself retired from the room for a conference with our associates, to see if they would pay the $25,000 extra or not. Being unable to find but one of our associates, and he being adverse to paying the additional sum, we retired to the room and told Mr. Mulvane that $500,000 was our best offer and must be accepted today. He absolutely declined to sell at any less sum than $525,000, and declared that all negotiations were off. We put on our coats and hats and started to leave the room, but in reply to a question as to how the matter was left, we intimated to Mr. Mulvane that we were left in a peculiar manner with our friends, inasmuch as we had gone to Topeka and made what we supposed to be a trade for the plant, conditionally that the stockholders would sell the stock but now we found that, while the stockholders had agreed to sell the stock and he had bought it in our interest, we were being charged a higher sum and we could not well explain to our associates this advance, and that we really preferred to abandon the whole trade rather than to have any suspicion cast on us by our associates that we had not explained to them the whole story when we returned from Topeka. Mr. Mulvane replied that he realized the position which we occupied, and that he was now inclined to accept
our proposition, provided we would pay him the sum of $60,000
229 cash, on signing of the contract instead of $50,000 before asked
for; that he could use that sum to advantage and would like to have it. He also stated that he had but $40,000 of the stock in hand, but he felt sure that Mr. Burr, the president of the Bank of North America, in the city of Boston, would be willing to guarantee that the payment of $60,000 on account would be a safe thing for us to do. Accordingly, after considerable negotiation and discussion, the following paper was drawn up and duly signed by all the parties. When Mr. Mulvane had put his signature to the paper, he said to us: "There; that is settled, now. You have my signature, which you didn't have

when we were in Topeka." The following is a copy of the agreement made in Boston:

BOSTON, *Dec. 14th*, 1889.

GENTLEMEN: I will sell you the entire capital stock of the Topeka Water Supply Company, of Topeka, Kansas, which consists of 4,000 shares of par value of $100 per share, for the sum of five hundred thousand dollars ($500,000) on the following terms of payment, viz: The sum of sixty thousand dollars ($60,000) to be paid in cash on the signing of a contract to be made and entered into as of this date, the consideration named in said contract to be four hundred and forty thousand dollars ($440,000) to be paid as follows, viz: The sum of two hundred thousand dollars ($200,000) to be paid February 10th, 1890, one hundred and forty thousand dollars ($140,000) to be paid February 20th, 1890, and one hundred thousand dollars ($100,000) to be paid March 20th, 1890, provided that final payment of the last-named sum of one hundred thousand dollars may be paid on February 20th, in said Wescott & Hanson may elect so to do, by giving me five days' notice of such intention.

Payments to be made for and delivery of said stock to be made at the National Bank of North America, in the city of Boston, Mass.

(Signed) JOAB MULVANE.

To George P. Wescott, Samuel Hanson.

We hereby accept your offer to sell the entire capital stock of the Topeka Water Supply Company for the price and on the terms and conditions above stated.

(Signed) GEO. P. WESCOTT,
SAMUEL HANSON.

It was now half past six p. m., and I was to take the train for Portland at seven o'clock. I bade them good night, with the understanding that Mr. Hanson and Mr. Mulvane would prepare the contract on Monday morning and that I would return to Boston Monday at 1.30 to sign the contract and complete payment, agreeable to the terms of agreement signed Saturday evening.

230

Monday morning I returned to Boston and at 1.30 went to Mr. Mulvane's room, No. 63, on the second floor and found the same locked. I then went to the Maverick bank and saw Mr. Hanson, who informed me that the money was ready to pay to Mr. Mulvane, to the amount of $60,000, but he had not seen Mr. Burr, president of the Bank of North America, to ascertain if Mr. Mulvane was responsible, and if they would guarantee a payment of the nature proposed to be made to Mr. Mulvane on the signing of the contract. I at once called on Mr. Burr and asked him the standing of Mr. Mulvane; in reply he said that it was the highest possible credit and that he was a thoroughly responsible, reliable party and he had the fullest confidence in his integrity; I then stated to him that I was to pay Mr. Mulvane $60,000, and asked him if he would be responsible for the honest and safe delivery to us of the stock of the water company, provided we made payment to Mr. Mulvane, as we intended; his

reply was prompt and to the point that he would not guarantee the life of any man, which was, in effect, what I was asking him to do; further than that, Mr. Mulvane ought not to ask us to do a thing that he would not do himself; he didn't believe the transaction was quite such a one as Mr. Mulvane would insist on having carried out; I returned to the Maverick bank at once and stated what Mr. Burr had said both to Mr. Hanson and to the president of the bank, Mr. Asa Potter; Mr. Hanson showed me a memorandum of agreement which he had prepared for the signature of Mr. Mulvane and myself, but stated that he had not submitted it to Mr. Mulvane and was waiting for me to go with him and meet Mulvane, when we would submit the memorandum and allow Mr. Mulvane to make such changes as he desired to make; that Mr. Mulvane had, in the morning, declined to come to the bank to confer with him, and had also declined to have the contract done by a lawyer; that he wanted it to be as simple as possible.

At 12:30 p. m. Mr. Hanson and myself went to the Parker house and met Mr. Mulvane in the office and retired to his room, No. 63, where we gave him the form of contract prepared by Mr. Hanson, to look over and asked him what changes he would suggest. The following is a copy of the contract:

Agreement made and entered into this 14th day of December, 1889, between Joab Mulvane, of Topeka, Kansas, party of the first part, and Geo. P. Wescott, of Portland, Me., and Samuel Hanson, of Boston, Mass., party of the second part.

231 The party of the first part hereby sells and agrees to have properly assigned, transferred and delivered to said party of the second part, upon terms of payment hereinafter named, the entire capital stock of the Topeka Water Supply Co., of Topeka, Kansas, which consists of four thousand shares of the par value of one hundred dollars each, for the sum of five hundred thousand dollars.

The party of the second part hereby purchases and agrees to pay for said four thousand shares of Topeka Water Supply stock as follows: Sixty thousand dollars on signing this agreement, two hundred thousand dollars on the 10th day of February, 1890, one hundred and forty thousand dollars on the 20th day of February, 1890, and the further sum of one hundred thousand dollars on the 20th February, 1890, unless said party of the second part elect to pay said one hundred thousand dollars on the 20th March, 1890, which they may do on giving notice of such intention to the party of the first part five days prior to said 20th of February.

The party of the first part also agrees to at once place in the hands of the cashier of the National Bank of North America, in the city of Boston, Mass., the certificates representing the entire capital stock of the Topeka Water Supply Company, before named, which certificates shall be transferred in blank. It being the intention of this agreement that the stock shall be delivered and paid for at the said National Bank of — America.

The party of the second part also agrees to pay to the party

of the first part interest from the first day of January, 1890, at the rate of six per cent. per annum, on the sums amounting to four hundred and forty thousand dollars, until the date on which said sums are paid to the party of the first part. In consideration for which the party of the first part hereby agrees that said corporation shall be turned over to said party of the second part on the first day of January, 1890, free from all debts and oncumberances of every kind, except the funded debt, consisting of one hundred and twenty thousand first-mortgage bonds.

He at once objected to our taking possession of the company on January 1st, because he had not then obtained the last $12,000 of stock and it might be impossible to do so before January 1st. We then suggested making a change, so that the possession of the company should be taken after the delivery of all the stock, agreeable to the terms of the agreement of December 14th. He did not seem satisfied with this arrangement but did not make further objection to the contract as submitted. In conversation we told him that we had a conference with Mr. Burr in regard to his standing and business integrity, which we explained had been made
232 necessary because the bank closed at two o'clock, and we wished to know before meeting him whether Mr. Burr would guarantee the performance of the agreement which Mr. Mulvane had said to us Saturday evening that Mr. Burr would do. I informed him that Mr. Burr had given him a high recommendation for integrity and financial ability, but he was not willing to guarantee the safe delivery of the stock agreeable to the terms of the contract provided for and did not think that Mr. Mulvane should ask us to do so, until the stock had been put up against the money in the hands of some bank or responsible person; then he, Mulvane, said I understand you will not put up the money unless I put up the stock and this means more delay. We replied, that inasmuch as Mr. Burr would not guarantee his so doing we must insist on some security. He took the ground that this was an evasion of the contract and that we ought to pay the money to him, because he was responsible, and he had expected that his standing at home, and his well-recognized financial ability to make good his promises would be accepted here readily and that we should make the payment of $60,000 without his putting anything against it except his receipt on account, and he thought the recommendation Mr. Burr had given him was ample, and all that had been contemplated or expected by him at the time of our interview on Saturday, and he expected that we would pay the money on the recommendation given by Mr. Burr.

At this point Mr. Hanson said to Mr. Mulvane that he certainly should not ask us to do what he would not do himself, and that we would not expect him to trust us for any part of the payment down, and that in support of our ability and competence to pay, that Mr. Wescott had a letter from the Casco bank as to his standing in Portland, which was equally as high as that which Mr. Mulvane had in his own town. At this point I passed Mr. Mul-

vane the following letter for him to read, stating to him that before our interview with him on the 14th, the cashier of the Casco bank had been asked for a letter, to be addressed to him, which he had given me, but when he asked for a deposit of $60,000 I did not suppose that the letter would be any object for him to think of, or even to read, and I hadn't presented the letter to him, and did not do it now, only to show that my standing was equal to that given him by Mr. Burr. A copy of the letter is as follows:

233 The Casco National Bank of Portland, Maine.

DECEMBER 13TH, 1889.

Joab Mulvane, Esq., Topeka, Kansas.

DEAR SIR: I address you this letter that you may know the reputation for responsibility which Hon. Geo. P. Wescott of this city enjoys, should you desire such knowledge.

Mr. Wescott is the surviving partner of the firm of Joseph Wescott and Son, and as a business man has been engaged in some of the largest industrial enterprises in this section, and with uniform success in results. He is considered in this community to be a man of wealth, and is always equal to his agreements. We have known him in this bank as one of its most valuable directors for more than eighteen years, and have no hesitation in recommending him to any one with whom he may have business relations, as a man perfectly reliable and responsible to the extent of any engagements he would make. This is our opinion of him, and we feel it is the sentiment of all those who know him in this city and State.

Yours respectfully,

(Signed) M. R. GODING, *Cashier.*

Mr. Mulvane, having read the letter, said that the recommendation was certainly good enough to show that we were acting in good faith throughout.

Room 63 being very cold we then went to room 304 and continued our negotiations; Mr. Mulvane had possession of the memorandum which Mr. Hanson had drawn, and had it in his pocket; I asked for the copy and undertook to get Mr. Mulvane to agree to such modifications of the contract as would meet his views and make it so that he would sign the same; he absolutely declined to discuss the contract or to suggest any change to be made in any manner whatever; I made some changes in pencil on the memorandum, which will appear in my handwriting; Mr. Mulvane left the room and when he came back about half past five, he said that he was satisfied that we could not raise the money and consequently he had determined to declare the whole matter off, and opened the door and left the room; we called him back and suggested that he return the memorandum which he had in his pocket, which he declined to do, saying that he supposed we had a copy of it; we assured him that we had no copy, and that it was only a rough draft on which we had asked him to make such changes as would meet his views,

but on which he had declined to make any suggestions or enter
234 into any conference whatever in relation to the matter; he, being pressed for the paper, agreed to have a copy made and return the paper at once; at half past six he returned the typewriter's copy to us, saying that he should keep the original, and that all negotiations were off, so far as he was concerned; we then asked him if we could have an interview with him in the morning at the Bank of North America, where we had no doubt that, with Mr. Burr present, we could arrange all matters in an amicable and satisfactory manner; he declined to hold any further interviews with us, but said that any communication we had to make, left at the Bank of North America, would be considered by him, but that he didn't want to have any further conversation with us on present negotiations.

GEO. P. WESCOTT.

I, Samuel Hanson, of Boston, Massachusetts, being present at each and all of the interviews pending the making of the negotiations and transactions had with Joab Mulvane, of Topeka, Kansas, relating to the purchase of the water works of the Topeka Water Supply Co., Topeka, Kansas, hereby certify that I have read the foregoing statement made by Geo. P. Wescott, of Portland, Maine, relating thereto, and find the same to be correct, according to the best of my recollection.

I would, however, make the following additions to his statement: My recollection is that when we referred to making payments of $60,000 at National Bank of North America, Mr. Mulvane said that Mr. Burr would give us such assurances that the matter would be perfectly satisfactory to us, and with that statement we left the matter. I also referred him to the Maverick national bank in regard to my own ability to perform the contract, stating that Mr. Potter was one of the parties at interest. Mr. Mulvane also stated that his reason for asking a price in excess of $500,000 was that he had not bought a single share of the stock for which he had not paid more than par. I would also add that on the 17th inst. Mr. Potter wrote Mr. Mulvane, at New York, expressing surprise at his action and requesting that all papers be laid before Mr. Burr, the president of the Bank of North America, and we abide by his decision; but up to this date no reply has been received.

SAMUEL HANSON.

Boston, December 21, 1889.

235 No. 5.

Statement Made by Geo. P. Wescott and Samuel Hanson, Dec'r 17 & 21, 1889.

COMMONWEALTH OF MASSACHUSETTS, }
County of Suffolk, } *ss:*

On this twenty-eighth day of January, A. D. 1890, before me, Samuel Jennison, a commissioner of the State of Kansas, residing in Boston, duly commissioned and qualified to take affidavits, &c., for

said State, personally appeared in said Boston Geo. P. Wescott, of Portland, Maine, and Samuel Hanson, of said Boston, and severally made oath that the statements and all matters and things set forth in their writings hereto attached and signed by them respectively are true to the best of their knowledge and belief.

In witness whereof I have hereto set my hand and official [SEAL.] seal, at said Boston, this 28th day of January, A. D. 1890.

SAMUEL JENNISON,
Commissioner for Kansas in Boston.

Indorsed: No. 6448. U. S. circuit court. Samuel Hanson *et al.* vs. Joab Mulvane *et al.* Affidavit of Geo. P. Wescott. Filed Feb. 13, 1890. Geo. F. Sharitt, clerk.

EXHIBIT "D," WESCOTT'S TESTIMONY.

Agreement made and entered into this 14th day of December, 1889, between Joab Mulvane, of Topeka, Kansas, party of the first part, and Geo. P. Wescott, of Portland, Maine, and Samuel Hanson, of Boston, Mass., party of the second part.

The party of the first part hereby sells and agrees to have properly assigned, transferred and delivered to said party of the second part, upon terms of payment hereinafter named, the entire capital stock of the Topeka Water Supply Company, of Topeka, Kansas, which consists of four thousand shares, of the par value of one hundred dollars each, for the sum of five hundred thousand dollars.

The party of the second part hereby purchases and agrees to pay for said four thousand shares of Topeka Water Supply stock as follows: Sixty thousand dollars on signing this agreement; two hundred thousand dollars on the 10th day of February, 1890; one hundred and forty thousand dollars on the 20th day of February, 1890, and the further sum of one hundred thousand dollars on the 20th February, 1890, unless said party of the second part elect to
236 pay said one hundred thousand dollars on the 20th March, 1890, which they may do on giving notice of such intention to the party of the first part five days prior to said 20th of February.

The party of the first part also agrees to at once place in the hands of the cashier of the National Bank of North America, in the city of Boston, Mass., the certificates representing the entire capital stock of the Topeka Water Supply Company before named; which certificates shall be transferred in blank. It being the intention of this agreement that the stock shall be delivered and paid for at the said National Bank of North America.

The party of the second part also agrees to pay to the party of the first part interest from the first day of January, 1890, at the rate of six per cent. per annum on the sums amounting to four hundred and forty thousand dollars until the date on which said sums are paid to the party of the first part. In consideration for which the party of the first part hereby agrees that said corporation shall be turned over to said party of the second part on the 1st day of Janu-

ary, 1890, free from all debts and incumbrances of every kind, e cept the funded debt, consisting of one hundred and twenty th sand first-mortgage bonds.

EXHIBIT "E," POTTER'S TESTIMONY.

H. P. Dillon, master.

(Copy.)

MAVERICK NATIONAL BANK,
BOSTON, *December 17th*, 1889

Joab Mulvane, Esq., c/o Fourth nat. bank, New York city.

DEAR SIR: Regarding the purchase of the stock of the Topeka water works, in which I am an interested party, and our Mr. Hagerson has conferred with you upon, I am at a loss to understand the position you have taken in the matter.

I see nothing inconsistent in the agreement as written with the preliminary letter addressed by yourself.

I beg to ask your permission to refer the matter and the papers to our mutual friend, Mr. Isaac T. Burr, and am willing to abide by his decision and conclusion.

Yours truly,
(Signed) ASA P. POTTER

Indorsed: # 6448. George P. Wescott *vs.* Joab Mulvane. Exhibits to testimony of Wescott & Potter. Filed M'ch 3, 1892. G. F. Sharitt, cl'k.

237 ROBERT H. WEEMS, first being duly sworn, says:

By Mr. SMITH:

Q. What is your name, age, place of residence, and occupation?

A. My name is Robert H. Weems; my age is 43; I reside in Brooklyn, and my occupation, a banker.

Q. How long have you been engaged in the banking business?

A. About 25 years, off and on.

Q. During such time have you had reason to investigate the value of water company stock and water company plants in various cities through the West?

A. I have.

Q. Have you become interested in any water properties throughout the West during that period of time?

A. For many years I made a specialty of negotiating the bonds of water companies and have sold such securities to the amount of millions of dollars.

Q. From such experience are you able to determine the value of a water plant in a western city?

A. I consider myself competent.

Q. What, in your judgment, would be the value of a water plant including the franchise, in a city of 45,000 population; said wa

plant having 36½ miles of pipe (cast iron) laid, with proper gates, etc., with 290 fire-hydrants set, with proper size of pipe for supplying water for domestic and fire purposes, with two Holly quadruplex engines of 3,000,000 gallons capacity, and one Holly-Gaskill horizontal compound condensing engine of 4,000,000 gallons capacity, each 24 hours, with ample boiler capacity for the pumps, with plenty of water; the consumption of water being an average of 900,000 gallons per day, with an extended pipe system; so that an additional income of 25% or $14,000 could be secured *without any great expense*, other than laying of service pipe, say having an

Income of		$56,000
25% extra		14,000
		70,000
Operating expenses	11,000	
Interest	13,000	
		24,000
Net income of		46,000

What would be your estimate of the value of property of that character on December 14th, 1889?

238 A. If the franchise had a number of years to run and as is usually the case was renewable for another term of years on its expiration, I should say that a water plant as described with a net income of $59,000 over and above operating expenses, would be worth between $900,000 and $1,000,000 in cash.

ROBT. H. WEEMS.

Indorsed: No. 6448. Testimony. Filed Mar. 3, 1892. Geo. F. Shariff, clerk.

In the Circuit Court of the United States, District of Kansas, First Division.

GEORGE P. WESCOTT and SAMUEL HANSON, Complainants,
vs.
JOAB MULVANE, Defendant.

Petition of said complainants and for leave to submit the question of damages arising under and by virtue of the breach of the contract referred to in said bill to the determination of a jury.

The said complainants herein now come and respectfully show unto the court that since the filing of their bill herein, reference to which is hereby made, and the same made a part hereof, as is fully set out in *hæc verba*, certain persons by the name of Woodbury and Moulton, resident in Portland, Maine, filed a petition for leave to be made parties in this suit, and to set up their rights herein. That the said Woodbury and Moulton were citizens of the same State as the said George P. Wescott, one of the complainants herein. That

the said interest of the said Woodbury and Moulton arose by reference in said bill to the following claim of fact, namely: That, after the said Joab Mulvane had entered into a contract with the said complainants, as set out in said bill of complaint, and in breach and violation of said agreement, he sold the stock by his said agreement with complainants to them agreed to be sold, to Messrs. Coffin & Stanton, of New York, who in turn, and before the filing of said bill, as claimed and alleged, had entered into an arrangement or agreement with the said Woodbury and Moulton, whereby the said Woodbury and Moulton became half owners of the interest claimed to have been purchased by the said Coffin & Stanton.

It further appears by the record in this case, and is a fact, that at the time the bill of complaint was filed herein, and a preliminary injunction allowed thereon, the said Joab Mulvane had not fully performed his said contract by the delivery of the stock aforesaid to the said Coffin & Stanton, and all of the stock was still in his
239 hands. That thereupon the said Coffin & Stanton filed their certain motion to dissolve said injunction upon the grounds *inter alia* that the said Woodbury and Moulton had a substantial interest in the property which was the subject-matter of said suit, and being citizens of the same State as the complainant Wescott, the making of the said Woodbury and Moulton parties thereto would oust the jurisdiction of the court; and thereupon the court upon this ground, and this ground alone, dissolved said injunction, leaving the said bill to stand as against the parties who had been properly brought into court, and of whom jurisdiction had been acquired. That thereupon, and as soon as said injunction was dissolved, the said Joab Mulvane carried out his said contract with the said Coffin & Stanton and transferred to said Coffin & Stanton all and singular the interests and rights which he had contracted to sell and deliver, as appears by said bill of complaint to the complainants herein. That by reason of such transfer he made it impossible to enforce specific performance of said contract as to the said Mulvane.

Your petitioners further allege that the price received by the said Mulvane from the said Coffin & Stanton was fifty thousand dollars in excess of the price which the said complainants had contracted to pay and that the said property so as aforesaid contracted to be sold, and sold by the said Mulvane to the said petitioners was worth a sum largely in excess of that which the said Mulvane had contracted to sell the same for to said petitioners, and that, by reason of his, the said Mulvane's breach of contract and by reason of the acts and doings of the said Mulvane, which placed it beyond his power to perform his said contract and agreement with your petitioners, your petitioners have been largely damaged, to wit: in the sum of one hundred thousand dollars, for which they should have judgment. That it was solely owing and due to the acts and defaults of the said Mulvane subsequent to the execution of said contract that the said property was placed beyond his reach and in such manner as made it impossible for him to specifically perform the same, or for the court to decree such performance; but in justice and good conscience the said bill should be still held by the court to ascertain what, if any

damage has been suffered by your said petitioners on account of the breach of said contract by the said Mulvane, and to ascertain and assess the same.

Wherefore, your petitioners pray that the said bill be retained and the question of damages submitted under proper instructions and proof to the determination of a jury.

All of which is respectfully submitted.

ROSSINGTON, SMITH & DALLAS,
Sol. for Compl'ts.

240 U. S., DIST. OF KS., }
First Division. }

Charles B. Smith being duly sworn, deposes and says that he is one of the solicitors and counsel for the complainants herein; that he has read the foregoing petition and knows that the allegations thereof are true, except and save the amount of damage claimed to have been caused by said breach.

CHAS. BLOOD SMITH.

Subscribed and sworn to before me the 4th day of March,
[SEAL.] 1892.

GEO. F. SHARITT, *Clerk.*

No. 6448. United States circuit court. Geo. P. Wescott *et al. vs.* Joab Mulvane. Petition. Filed Mar. 4, 1892. Geo. F. Sharitt, clerk. Rossington, Smith & Dallas, att'ys for pl'ff.

Order.

In the Circuit Court of the United States for the District of Kansas.

GEORGE P. WESCOTT and SAMUEL HANSON, Compl'ts, } No. 6448.
vs.
JOAB MULVANE ET AL. }

Upon application of complainants, it is hereby ordered that they be granted until May 15th, A. D. 1892, to file their brief in this cause, and that said cause be set down for final hearing on the first day of June, A. D. 1892, term of this court at Leavenworth in the district of Kansas, or as soon thereafter as counsel can be heard, and that complainants shall have at said time and place three hours in which to present the matter in open court, if they desire to argue said cause orally.

Dated April 28th, 1892.

JOHN A. RINER, *Judge.*

Indorsed: No. 6448. Wescott & Hanson *vs.* Joab Mulvane *et al.* Order. Filed Ap'l 28, 1892. Geo. F. Sharitt, clerk.

Memorandum of Decision.

In the U. S. Circuit Court, District of Kansas.

GEORGE P. WESCOTT ET AL. *against* JOAB MULVANE. } 6448.

This is a bill for the specific performance of a contract for the sale of the Topeka Water Works Company. The contract sought to be specifically enforced is as follows:

241 "BOSTON, *December* 14, 1889.

GENTLEMEN: I will sell you the entire stock of the Topeka Water Supply Company, of Topeka, Kansas, which consists of four thousand (4,000) shares of par value of one hundred dollars ($100.00) per share for the sum of five hundred thousand dollars ($500,000) on the following terms of payment, viz: The sum of sixty thousand dollars ($60,000) to be paid in cash, on the signing of a contract to be made and entered into as of this date. The consideration named in the said contract to be four hundred and forty thousand dollars ($440,000) to be paid as follows, viz: The sum of two hundred thousand dollars to be paid February 10, 1890; one hundred and forty thousand dollars to be paid February 20, 1890, and one hundred thousand dollars to be paid March 20, 1890. Provided, that final payment on the last-named sum of one hundred thousand dollars may be paid on February 20, 1890, if said Wescott and Hanson may elect so to do by giving me five days' notice of such intention, payment to be made for and delivery of said stock to be made at the National Bank of North America, in the city of Boston, Massachusetts.

(Signed) JOAB MULVANE.

To George B. Wescott and Smith Hanson."

"We hereby accept your offer to sell the entire capital stock of the Topeka Water Supply Company for the price and on the terms and conditions above stated.

(Signed) GEORGE B. WESCOTT.
SAMUEL HANSON."

The question, and the only question to be determined is whether or not this contract is one which can be specifically enforced; and if that be determined in the affirmative, it is agreed by counsel (Mr. Mulvane having disposed of the property), that the measure of damages shall be one hundred thousand dollars. The contract, it seems to me, is a very plain one, and will therefore not be difficult of construction. If the plaintiffs in the case had complied with the terms of the contract, there is no doubt but what it could be enforced against the defendant. The proposition, as will be seen from a careful examination of the contract, is that the price shall be five hun-

dred thousand dollars, and that sixty thousand dollars of that shall be paid in cash upon the signing of a contract to be made as of the same date. While this seems to contemplate another contract to be executed by the parties at the time of the closing of the deal, yet the terms and conditions of that contract are fully set forth in this memorandum; and had defendants complied with all of its terms, my own view is that they would have needed no other contract as the agreements of the parties; while somewhat informal, perhaps, are fully set forth in this memorandum. They did not, however, comply with the terms of the contract as shown by the testi-
242 mony. By this memorandum, if it is to be taken for the contract between the parties, they were to pay Mr. Mulvane sixty thousand dollars in cash. That does not mean, perhaps, that they should have the currency and hand it to him; but they should at least by the terms of the *the* contract have paid that amount of money to the National Bank of North America, to Mr. Mulvane's credit. That they did not do, although some of the witnesses testify that they were prepared to do so; yet, under the terms of the agreement Mr. Mulvane was not obliged to do anything until they had either paid to him, or the bank specified in the contract, to his credit, the amount agreed to be paid in cash; and that payment by the terms of the agreement should have been made unconditionally. This they did not do, and by reason of their failure to do so Mr. Mulvane had the right to rescind the contract, which he did. Had they made this payment, then, in case Mr. Mulvane declined to execute the additional contract mentioned in the memorandum, the memorandum itself would have been sufficient. While the evidence showed they expressed a willingness to make this payment, yet they did not make or tender payment unconditionally; and Mr. Mulvane saw fit to take advantage — this, as he had the unquestioned right to do, after failure to make the payment, or tender in the manner provided by the terms of the agreement, to declare the negotiations at an end.

I do not deem it necessary to comment upon the testimony at length, as the views already expressed disposes of the case. A decree will be entered dismissing the bill.

JOHN A. RINER, *Judge*.

Indorsed: No. 6448. Memorandum of decision. Filed Sept. 26, 1892. Geo. F. Sharitt, clerk.

Decree.

In the Circuit Court of the United States for the District of Kansas.

GEORGE P. WESCOTT and SAMUEL HANSON, Plaintiffs,
vs.
JOAB MULVANE, THE TOPEKA WATER SUPPLY COMPANY, THE Topeka Water Company, William Edward Coffin, Walter Stanton, Charles Harvey Jackson, and Charles Fawcet Street, Engaged in Business under the Firm Name and Style of Coffin & Stanton, and The Atlantic Trust Company, Defendants.

This cause having heretofore been dismissed as to all of the above-named defendants except the said Joab Mulvane, on this day came on to be heard upon the bill of complaint herein, the answer thereto of the said defendant, Joab Mulvane, the replication of the
243 complainants to said answer and the evidence taken and filed in said cause, and having been argued by counsel for the respective parties—

Now, therefore, on consideration thereof, it is ordered, adjudged and decreed that the said complainants' bill of complaint be and the same is hereby dismissed, with costs to the said defendant, Joab Mulvane, to be taxed.

Thereupon said complainants pray an appeal to the circuit court of appeals, which is allowed.

Thereupon, upon application of said complainants, supersedeas bond is fixed at the sum of $1,000.00 and appeal allowed.

JOHN A. RINER, *Judge.*

Indorsed: No. 6448. George P. Wescott *et al. vs.* Joab Mulvane *et al.* Decree. Filed Sept. 26th, 1892. Geo. F. Sharitt, clerk.

Know all men by these presents, that we, George P. Wescott and Samuel Hanson, as principals, and A. J. Tullock, as surety, are held and firmly bound unto Joab Mulvane in the full and just sum of one thousand dollars to be paid to the said Joab Mulvane, his heirs, executors, administrators or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Dated this 14th day of December, in the year of our Lord one thousand eight hundred and ninety-two.

The condition of the above obligation is such that, whereas, lately, at the adjourned June term of the United States circuit court for the district of Kansas, in the eighth circuit, in a suit depending in said court between George P. Wescott and Samuel Hanson, complainants, and Joab Mulvane, defendant, a final decree was rendered against the said complainants, and the said complainants having obtained an allowance of appeal and filed a copy thereof in the clerk's office of said court to reverse the said decree in said suit, and a citation directed to the said Joab Mulvane, citing and admonishing him to be and appear in the United States circuit court of appeals for the

eighth circuit at the city of Saint Louis, Missouri, sixty days from and after the date of said citation.

Now, if the said George P. Wescott and Samuel Hanson shall prosecute said allowance of appeal to effect, and answer all costs and damages if they fail to make good their plea, then the above
244 obligation to be void, otherwise to remain in full force and virtue.

Witness our hands the day and date above written.

GEORGE P. WESCOTT,
By CHAS. B. SMITH,
His Solicitor.
SAMUEL HANSON,
By CHAS. B. SMITH,
His Solicitor.
A. J. TULLOCK.

Approved:
JOHN A. RINER, *Judge.*

Indorsed: No. 6448. Wescott & Hanson *vs.* Joab Mulvane. Bond. Filed Dec. 19, 1892. Geo. F. Sharitt, clerk.

Assignment of Errors.

In the Circuit Court of the United States for the District of Kansas, First Division.

GEORGE P. WESCOTT and SAMUEL HANSON, Complainants,
vs.
JOAB MULVANE, Defendants. } #6448.

The said George P. Wescott and Samuel Hanson, complainants, complain of Joab Mulvane, defendant, for that at the November, A. D. 1892, term of said court a final decree was entered in said cause dismissing the bill of said complainants. A copy of the record of said decree and proceedings in said cause is hereto attached and made a part of this assignment of errors.

And said complainants aver that there is error in said record and proceedings, in this, to wit:

I. The court erred in dissolving the temporary injunction theretofore granted against the defendant, Joab Mulvane.

II. The court erred in refusing to enter a decree in favor of said complainants and against the said defendant, Joab Mulvane, for one hundred thousand dollars, the stipulated measure of damages in case said complainants were entitled to recover.

245 III. The court erred in entering a decree in favor of said defendant, Joab Mulvane, and against said complainants.

IV. The court erred in entering a decree dismissing the bill of said complainants, as shown by said record.

ROSSINGTON, SMITH & DALLAS,
Solicitors for George P. Wescott and Samuel Hanson.

Indorsed: No. 6448. U. S. circuit court. Wescott & Hanson vs. Joab Mulvane. Assignment of errors. Filed Dec. 19, 1892. Geo. F. Sharitt, clerk.

In the Circuit Court of the United States for the District of Kansas, First Division.

GEORGE P. WESCOTT and SAMUEL HANSON, Appellants,
vs.
JOAB MULVANE, Appellee.

Now come the above-named appellants, George P. Wescott and Samuel Hanson, and said appellants, conceiving themselves aggrieved by the final decree entered on the 26 day of September, 1892, at the June, 1892, term of the United States circuit court for the first division of the district of Kansas, in the above-entitled proceedings, do hereby appeal from the said final decree to the United States circuit court of appeals in the eighth circuit, and pray that these appellants' appeal may be allowed, and that a transcript of the record of proceedings and papers upon which said judgment and decree was rendered, duly authenticated, may be sent to the United States circuit court of appeals for the eighth circuit.

ROSSINGTON, SMITH & DALLAS,
Solicitors for George P. Wescott and Samuel Hanson, Appellants.

And now, to wit, on this 19th day of December, 1892, at the November term of the circuit court of the United States for the district of Kansas, first division, it is ordered that an appeal be allowed in the above-entitled cause, as prayed for.

JOHN A. RINER, *Judge.*

Indorsed: No. 6448. U. S. circuit court. Wescott & Hanson vs. Joab Mulvane. Petition for appeal & allowance thereof. Filed Dec. 19, 1892. Geo. F. Sharitt, clerk.

246 UNITED STATES OF AMERICA, *District of Kansas*, } ss:

I, Geo. F. Sharitt, clerk of the circuit court of the United States of America, for the district of Kansas, do hereby certify the foregoing to be a true, full and correct copy of the record and proceedings in said court in the suit of George P. Wescott and Samuel Hanson, complainants, *vs.* Joab Mulvane and others, defendants, number 6448—excepting the testimony of Joab Mulvane on behalf of defendants therein. I further certify that the original citation is attached hereto, and made a part of this transcript.

The Seal of the Circuit Court of the United States, District of Kansas, 1862.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at my office in Topeka, in said district of Kansas, this 3rd day of January, A. D. 1893.

GEO. F. SHARITT, *Clerk.*

The United States of America to Joab Mulvane, Greeting:

You are hereby cited and admonished to be and appear, in the United States circuit court of appeals, for the eighth circuit, at the city of St. Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to an appeal filed in the clerk's office of the circuit court of the United States, for the first division of the judicial district of Kansas, wherein George P. Wescott and Samuel Hanson, are appellants, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellants, as in said appeals mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable John A. Riner, judge assigned to hold the circuit court of the United States for the district of Kansas, this 19th day of December, in the year of our Lord one thousand eight hundred and ninety-two.

JOHN A. RINER,
United States District Judge for the District of Wyoming, Assigned to Hold the Circuit Court for the District of Kansas.

Received this writ December 19th, 1892, at Topeka, Kans., and served same on the within-named defendant, Joab Mulvane,
247 by delivering to him personally a true and certified copy of this writ with all the endorsements thereon, at his usual place of business in Topeka, Kans., December 20, 1892.

R. L. WALKER,
U. S. Marshal,
By R. W. DE BOST, *Deputy.*

Fees, $2.00.

No. 6448. United States circuit court, first division of the judicial district of Kansas. Wescott and Hanson *vs.* Joab Mulvane. Citation. Filed Dec. 19th, 1892. Geo. F. Sharitt, clerk. Filed Jan. 13, 1893. John D. Jordan, clerk.

248 United States Circuit Court of Appeals for the Eighth Circuit.

I, John D. Jordan, clerk of the above-named court, do hereby certify that the foregoing printed record, consisting of one hundred and seventy-nine (179) pages, is a full, true, and complete copy printed from the transcript of record as certified by the clerk of the circuit court of the United States for the district of Kansas in a certain cause now depending in the United States circuit court of appeals for the eighth circuit, wherein George P. Westcott and Samuel Hanson are appellants and Joab Mulvane is appellee, No. 230, May term, 1893, as full, true, and complete as the original of the same now remains on file and of record in my office.

In testimony whereof I hereunto subscribe my name and affix the

seal of said court, at the city of St. Paul, Minnesota, this 11th day of October, A. D. 1893.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals for the Eighth Circuit.

UNITED STATES OF AMERICA, }
Eighth Circuit, } *ss:*

I, Walter H. Sanborn, U. S. circuit judge for the eighth
249 circuit, do hereby certify that John D. Jordan, who signed the foregoing certificate, is now the duly appointed, acting, and qualified clerk of the United States circuit court of appeals for the eighth circuit, and that the signature appended to the foregoing certificate is his genuine signature and full faith and credit should be given to all his official acts as such clerk.

Witness my hand at the city of St. Paul, Minnesota, this 11th day of October, A. D. 1893.

WALTER H. SANBORN,
U. S. Circuit Judge for the Eighth Circuit.

UNITED STATES OF AMERICA, }
Eighth Circuit, } *ss:*

I, John D. Jordan, clerk of the United States circuit court of appeals for the eighth circuit, do hereby certify that the Honorable Walter H. Sanborn, who signed the foregoing certificate, is a duly appointed, acting, and qualified judge of the United States circuit court of appeals for the eighth circuit; that the signature appended to said certificate is his genuine signature and that full faith and credit should be given all his official acts as such judge.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of St. Paul, Minnesota, this 11th day of October, A. D. 1893.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals for the Eighth Circuit.

250 Counsel for the plaintiff here offered in evidence the opinion of the United States circuit court of appeals in the case of Wescott & Hanson *vs.* Joab Mulvane, being the same opinion which was heretofore offered in evidence by plaintiff's attorney.

Counsel for the defendant objected to said opinion as incompetent, irrelevant, and immaterial.

The court sustained the objection; to which ruling of the court the plaintiff at the time duly excepted.

Here the plaintiff rested his case.

Thereupon the defendant demurred to the evidence produced on behalf of the plaintiff, and at the same time filed in the office of the

clerk of the court his written demurrer in words and figures as follows, to wit:

"In the District Court of Shawnee County, Kansas.

JOAB MULVANE, Plaintiff,
vs.
A. J. TULLOCK ET AL., Defendants.

Comes now the defendant in the action above entitled and demurs to the evidence produced on behalf of the plaintiff upon the ground that said evidence does not establish a cause of action in favor of plaintiff and against this defendant.

ROSSINGTON, SMITH & DALLAS,
Attorneys for Defendant."

Thereupon said demurrer was presented to the court by counsel, and, after the argument thereon, the court overruled said demurrer; to which ruling of the court the defendant excepted at the time.

MR. SMITH: If the court please, we now desire leave to amend our answer in respect to one fact, and that is simply to meet this question of attorneys' fees. We desire to state that the point was raised in the Federal court, and that under the law of the Federal courts attorneys' fees are not a proper measure of damages. I am very frank to tell the reason I do this. I want the record to show that there is a Federal question involved in this case. It will appear in the record at large, but it will more clearly appear, of course, if we put it in our answer.

THE COURT: Is not that the question the supreme court passed upon in this case?

A. (Mr. Smith). Yes, sir.

THE COURT: The amendment will be allowed.

Counsel for the defendant read to the court the proposed amendment, and the same was thereupon attached to and made a part of said answer and is in words and figures as follows, to wit:

"*Amendment to Answer.*

In the District Court of Shawnee County, Kansas.

JOAB MULVANE, Plaintiff,
vs.
A. J. TULLOCK ET AL., Defendants.

This defendant, further answering said petition of the plaintiff as amended, says that under the law of the United States, and as enforced and existing in the Federal courts at the time of the execution of said bond, attorneys' fees could not be allowed as damages
251 in a suit brought upon an injunction bond given in the Federal court for a breach of said bond; that said bond was executed by this defendant in contemplation of and in reliance upon

the law so, as aforesaid, regulating the liability of sureties upon bonds in the Federal courts; that ever since the execution of said bond the law of the Federal courts regarding said measure of damages and denying the right to recover attorneys' fees as a part thereof has remained the same.

By reason whereof this defendant submits that the said plaintiff ought not to have and recover anything in this action for or on account of attorneys' fees as a measure of his damages in the event he is entitled to recovery herein.

ROSSINGTON, SMITH & DALLAS,
Attorneys for Defendant."

Mr. LOOMIS: Now, if the court please, we desire to amend our petition by attaching a statement covering the points as shown by the testimony and to further amend our petition by showing in detail the damages we claim.

Counsel for the defendant objected to the allowance of leave to make said amendments to the petition.

The court overruled the objection and allowed the amendments as requested.

The defendant excepted to the ruling of the court.

Thereupon there was attached to and made a part of plaintiff's petition the amendments referred to by counsel, and the same are in words and figures as follows, to wit:

"Plaintiff further alleges that he has suffered damages caused by the issuance of said restraining order and temporary injunction as follows, to wit:

1. He was prevented from collecting from Coffin & Stanton and Woodbury & Moulton on a contract entered into between him and the said parties the sum of $500,000, which was due said Mulvane on the 10 day of February, 1890; that under said contract plaintiff agreed to sell to said Coffin & Stanton and Woodbury & Moulton all of the capital stock of the Topeka Water Supply Company for the sum of $550,000; that he received $50,000 in cash upon the signing of the contract and was to receive the balance of said purchase price upon the 10th day of February, 1890, upon turning over to the purchasers the said capital stock. Plaintiff alleges that he would have been ready and able to have made the delivery of the stock and to have complied with all the terms of the contract aforesaid at the time designated if he had not been prevented by said restraining order and said temporary injunction from so doing. Plaintiff further alleges that he was unable by reason of said injunction proceedings to collect the money due him under said contract until after the temporary injunction was dissolved; that said temporary injunction was dissolved on or about April 4th, 1890, and said contract was thereafter executed. Plaintiff therefore prays judgment against defendants for interest at six per cent. per annum on said sum of $500,000, which he was prevented from collecting, as aforesaid, from February 10, 1890, until April 4, 1890, the said interest amounting to the sum of $4,500.00.

2. Plaintiff further alleges that by reason of said restraining order

and temporary injunction he was compelled to pay out large sums of money in the way of attorneys' fees to resist the allowance and obtain the dissolution of said temporary injunction, which payments of attorneys' fees were reasonable and necessary: that the names of the lawyers to whom the fees were paid, together with dates of payments and amounts of fees, are as follows: April 14, 1890, Hurd & Dunlap, $6,000.00; April 30, 1890, A. L. Williams, $3,000.00; April 17, 1890, Eugene Hagan, $3,000.00; May 24, 1890, J. D. McFarland, $4,000.00. Plaintiff therefore prays for judgment against defendants for the amounts so, as aforesaid, paid out by him for reasonable and necessary attorneys' fees, together with interest upon each of said
252 payments at the rate of six per cent. per annum from the date of payment to date of verdict.

3. Plaintiff further alleges that by reason of said restraining order and temporary injunction he was compelled to pay out other sums of money as follows, to wit: April 6, 1890, expenses of Joab Mulvane and attorneys on trip to Little Rock to present motion to dissolve temporary injunction to Judge Caldwell, $128.68; March 31st, expenses of Attorney A. L. Williams on trip to Little Rock for same purpose, $75.00; March 11, 1890, expenses of Attorney Eugene Hagan to Little Rock to arrange with Judge Caldwell for a date to take up motions to dissolve injunction, $50.00; March 11, 1890, paid Geo. F. Sharitt, clerk U. S. circuit court, district of Kansas, costs caused by said injuction proceedings, $20.00; Feb. 15, 1890, paid same person for same purpose, $34.55; April 11, 1890, paid same person for same purpose, $37.25; Feb. 24, 1890, paid C. V. Safford, stenographer, for services rendered in preparing legal papers required in the defense of said injunction proceedings, $6.00; April 26, 1890, paid for telegrams relating to the defense of said injunction proceedings, $70.00; Feb. 7, 1890, paid expenses of D. W. Mulvane to New York, $240.00. D. W. Mulvane was sent to New York to confer with Coffin & Stanton and Woodbury & Moulton and to persuade them not to declare their contract forfeited by reason of Joab Mulvane's inability to carry out the contract on February 10, 1890, which inability was caused solely by reason of said restraining order and injunction proceedings. March 1, 1890, paid expenses of another trip of D. W. Mulvane, after temporary injunction was granted, for same purpose, $208.00. Plaintiff therefore prays judgment for said payments and each of them and for interest thereon from date of payment to date of verdict at the rate of six per cent. per annum. Plaintiff prays for judgment against defendants in the aggregate sum of $75,000 and costs of this suit.

A. L. WILLIAMS AND
N. H. LOOMIS,
Attorney for Plaintiff."

Thereupon counsel for the defendant asked the court to postpone the trial of this case because of the allowance of the said amendments to plaintiff's petition. The court denied the request; to which refusal of the court the defendant excepted at the time.

Thereupon the defendant, to maintain the issues upon his p produced and offered in evidence as follows:

A. H. VANCE, called as a witness on behalf of the defendant, be first duly sworn, testified as follows:

Direct examination.

Questions by Mr. HISTED:

Q. Please state your name.
A. A. H. Vance.
Q. What is your occupation?
A. Lawyer.
Q. Where are you engaged in practice?
A. Topeka.
Q. How long have you been engaged in the profession here?
A. About twenty-eight years.
Q. Judge Vance, suppose that on the 5th day of February, 18 George P. Wescott and Samuel Hanson filed a bill in equity in t United States circuit court against Joab Mulvane, the Topeka Wa Supply Company, the Topeka Water Company, and Coffin & Stant of New York, wherein the said Wescott & Hanson claimed to ha entered into a contract with Joab Mulvane, the owner of the capi stock of the Topeka Water Supply Company, par value four hu dred thousand dollars, for the purchase of the same at the agre price of five hundred thousand dollars. It was alleged in t bill that Mulvane had refused to comply with his contract a deliver the stock and had made sale of the same to Coffin Stanton, of New York city, at an advance of fifty thousa dollars; that it was proposed by Mulvane and Coffin & Stant to form a new corporation called the Topeka Water Compan which should become the owner of this plant, and th
253 Mulvane was about transferring the stock of the supp company and carrying out an agreement with referen to the formation of the new company. The complainants in t suit asked for specific performance of the contract with Mulva and for an order enjoining him from completing the contract wi Coffin & Stanton and enjoining the water companies and Coffin Stanton from further carrying out the contract with Mulvane. Up the filing of the bill the United States circuit court awarded a te porary restraining order restraining Mulvane and the water co panies from putting upon the record any deed of conveyance mortgage or from signing, sealing, or negotiating any bonds of t water company and enjoining Mulvane from transferring the sto of the supply company and Coffin & Stanton from negotiating t bonds of the water company or taking any further steps towar perfecting their contract of purchase with Mulvane. The court s the application for a temporary injunction on February 12th, an notice of the restraining order and time fixed for hearing the appl cation for temporary injunction was served upon Mulvane and t water companies. The application for a temporary injunction can

on for hearing before Judge Foster on February 12th, at which time all of the defendants appeared and resisted the same. At this hearing they were represented by the same counsel and presented the same defense. The court upon the hearing awarded a temporary injunction upon the complainants giving bond to the extent of seventy-five thousand dollars. The defendants afterwards filed separate motions to dissolve this injunction and noticed the same for hearing before Judge Caldwell, circuit judge, at Little Rock, on April third. On the fourth day of April the motion of Coffin & Stanton to dissolve the injunction was heard by Judge Caldwell, who at the time made an order in the case as follows:

"And now come said complainants, by Rossington, Smith & Dallas, their solicitors, and also come Joab Mulvane, the Topeka Water Supply Company, and the Topeka Water Company, by A. L. Williams, J. D. McFarland, Eugene Hagan, and A. A. Hurd, their attorneys, and also come Coffin & Stanton, by Silas B. Jones and J. D. McFarland, their attorneys; and the motion of Coffin & Stanton to dissolve the temporary injunction issued in this cause came on for hearing, and it appearing that an indispensable party defendant to this suit is not made a defendant and cannot be made a defendant without ousting the jurisdiction of the court, the said indispensible party defendant and the plaintiffs being citizens of the same State, and it further appearing that the court granting the temporary injunction postponed the consideration and decision of this question until the coming in of the pleadings and proofs now before me on that subject, it is therefore ordered, considered, and adjudged that the temporary injunction granted in this cause by the circuit court on the thirteenth day of February, 1890, be, and the same is hereby, dissolved."

It appeared that Woodbury & Moulton, of Maine, were parties in this contract in association with Coffin & Stanton, of New York, and that Woodbury & Moulton and Coffin & Stanton were jointly interested in said contract with Mulvane, and which was in writing. The complainants in the suit were likewise citizens of Maine. The merits of the controversy were not considered by Judge Caldwell, but he distinctly refused to consider the same and, as shown by the foregoing order, dissolved the injunction upon the sole ground of want of jurisdiction. These same attorneys who appeared in the injunction branch of the suit also had charge of the defense
254 generally and prepared and filed various pleas and answers for the various defendants in the case. What, in your opinion, under the facts and circumstances hereinbefore set forth, was a reasonable compensation for attorneys' fees in and about the injunction branch of the case, having in mind the ground apparent from the contract of Mulvane and Coffin & Stanton and the record known to the attorneys at the time with reference to the diverse citizenship of the parties and its effect upon the jurisdiction of the court?

Counsel for the plaintiff objected to the question as incompetent, irrelevant, immaterial, and not based upon facts proven in the case.

The court overruled the objection; to which ruling of the court the plaintiff at the time duly excepted.

A. Three thousand dollars.

Q. That is, with reference to the injunction branch of the case and for all of the services?

A. Of all the attorneys.

Q. And for all the attorneys for all the defendants?

A. Yes, sir.

Q. What would you say, from the facts and circumstances I have already called to your attention, would be a reasonable compensation for attorneys' fees for appearing before Judge Caldwell at Little Rock and obtaining a dissolution of the temporary injunction alone?

Counsel for the plaintiff objected to the question as incompetent, irrelevant, immaterial, and not based upon facts proven in the case. The court overruled the objection; to which ruling of the court the plaintiff at the time duly excepted.

A. Do you mean attorneys for all the parties?

Q. Yes, sir; attorneys for all the parties appearing before Judge Caldwell and obtaining a dissolution; just that part of the injunction.

A. Two thousand dollars.

Cross-examination.

Questions by Mr. Loomis:

Q. You are not a very high-priced attorney, are you, Mr. Vance?

A. I don't know whether you think so or not.

Q. What do you think about it?

A. I try to be reasonable and fair.

Q. Is there any fixed and determined rule by which to get at the value of attorneys' services—the amount attorneys should charge?

A. None absolutely fixed, but they should take into consideration all the circumstances surrounding the case and the amount involved.

Q. What do you usually take into consideration when you make a charge for fees?

A. The character of the case and the amount involved.

Q. Is that all?

A. Yes, sir; practically all.

Q. Do you take into consideration the questions in the case?

A. Certainly. When I say the character of the case that is included.

Q. Do you take into consideration the results, whether you are beaten or whether you win?

A. Yes, sir.

Q. Do you charge a higher fee when you win than lose?

A. Yes, sir.

Q. Do you take into consideration the financial condition of the party you represent?

A. Yes, sir.

Q. If a man is wealthy, do you charge him more for the same services than you would if he was poor?

A. Not just stated in that way, and yet that enters into it.

Q. That is an element, is it?

A. Yes, sir.

Q. Suppose one party is a widow and the other a capitalist and you perform the same service for both, would you make any difference in your charge?

A. Yes, sir; not because there is any difference in the value, but because there is a difference in the condition of the party.

Q. Suppose the result or decision was going to be very det-
255 rimental to your client, break him up in business, and in another case involving the same facts and same work, and so on, it would be of trivial consequence to your client, would that make any difference in your charge?

A. Make a very material difference.

Q. If you were able to save your client from bankruptcy in a case involving an amount aggregating, say, half a million dollars, you would feel like charging a big fee, wouldn't you?

A. Yes, sir; I would. I think it would be worth it.

Q. Suppose in a case involving half a million dollars there is an injunction hanging over your client which he is bound to get rid of and if he cannot get rid of it in a very short time he will be unable to meet his obligations and will go into bankruptcy and you succeed in getting rid of the injunction and permitting him to carry out his contract and save himself from misfortune, would you think three thousand dollars a sufficient fee?

A. It would depend entirely upon the reason it was dissolved.

Q. Would it make any difference why it was dissolved?

A. Yes, sir.

Q. Suppose it was a question of jurisdiction, pure and simple. You raise the question in the circuit court before one judge and he ruled against you and you fought it as hard as you could and were compelled to go to another circuit judge of similar jurisdiction for the purpose of having the injunction dissolved, what would your charge be in a case of that kind?

A. It wouldn't make any difference. There would be two trials—would make a difference—two tests would make a difference. This is the proposition that I gave my judgment upon in this case, as I understand it. If I succeeded in obtaining favorable results that were very valuable to a client, but was the result of gaining the decision of the court my way upon an open question, it would be much more valuable than where a fact is developed in the course of the investigation that disposed of the jurisdiction of the court, irrespective of my ability *of* anybody'- else ability, and the case must be disposed of on that question of jurisdiction, because it is a fact that disposed of it and not any legal question that is argued, and therefore the value of the services is not the same at all; and if by great research and skill in combatting equal research and skill upon the other side the court has been persuaded that your view is correct, and therefore you get a decision, than, where the decision went off

because the fact decides it, whether the court or lawyers or anybody else wants it that way, that is the difference, in my judgment, in the value of the services.

Q. Suppose in the case I put to you, Mr. Vance, the attorneys had made a great deal of research upon three or four difficult questions, upon the question of jurisdiction as well, and the question of jurisdiction had been upon the construction of a contract and upon facts for the purpose of determining whether parties were indispensable parties, what would you think about fees under those circumstances?

A. It would make a material difference if it was disposed of on that proposition.

Q. If you had made your research and thought on these other propositions and it was disposed of on that, you think you would not be entitled to anything for your other work?

A. Not at all. It would make very great difference in the value of the services in this, that you had not succeeded upon the proposition that you advanced at all, but there is a fact develops that disposes of the case, because the court has not jurisdiction regardless of the merits of it and will dispose of it irrespective of what you
256 do—in other words, it is not the skill nor the ability of the lawyer that accomplished the result; that is what I mean, and that is what makes a very material difference, in my view, of the value of the services.

Q. When the trial court grants a temporary injunction after full argument and consideration, state whether or not it is ordinarily a pretty difficult thing to get that injunction dissolved.

A. Yes, sir; I think it is, especially upon a full hearing.

Q. Are you familiar with practice in Federal courts?

A. To some extent; not nearly as much as a great many attorneys.

Q. When one judge has jurisdiction of a case and is acting upon it and considering it and ruling upon the different phases of the case, I want you to state whether or not it is a difficult matter to get another Federal judge of equal jurisdiction to act upon phases of that case.

A. I think it is.

Q. Very difficult matter to do, isn't it?

A. Yes, sir.

Q. And if Judge Foster should grant a temporary injunction in a case after full consideration and argument, don't you think it would be quite a gigantic task to undertake to go to Little Rock and persuade Judge Caldwell to set it aside and dissolve the injunction?

A. Yes, sir; upon the merits of the case, I think so.

Q. Well, dissolve that temporary injunction upon a motion filed to dissolve it after the temporary injunction had been granted by Judge Foster?

A. When, as I understand it, the opinion rendered by——

Q. I am not referring now to this case. Take cases generally.

A. Generally, I say yes, without any hesitation.

Q. It is a very difficult matter to accomplish?

A. Yes, sir; generally, I say yes, without any hesitation. In almost every case he wouldn't hear it at all.

Q. Take a sharply contested case upon a promissory note involving five hundred dollars, brought in the district court, what, in your judgment, would be a reasonable attorneys' fee, supposing you got your judgment?

A. Fifty dollars would be a reasonable attorneys' fee.

Q. Suppose the promissory note involved five thousand dollars and there was a sharp contest and a possibility of being defeated on it and you finally succeeded in getting judgment.

A. Five hundred dollars would be a reasonable attorneys' fee.

Q. How do you get at that amount?

A. I get at the amount involved and the difficulty, as you suggest, in obtaining the judgment.

Q. You have taken about ten per cent. of the amount involved, haven't you?

A. Yes, sir; that is what I have.

Q. Now, suppose the promissory note was fifty thousand dollars and there was a good, hard contest and you succeeded in getting your judgment, what would you think would be a reasonable attorneys' fee?

A. It would be according to the questions that were involved. It would run from two to five thousand dollars.

Q. Five thousand dollars would be ten per cent.?

A. Yes, sir.

Q. From five to ten per cent.?

A. Yes, sir.

Q. Are you getting at these fees on a percentage basis?

A. Yes, sir.

Q. Suppose the amount, then, was a hundred thousand dollars, and a good, sharp contest and you succeeded in getting your judgment, what would be a reasonable attorneys' fee?

A. It would run in proportion the same way, increase of fees.

Q. From five to ten per cent.?

A. Yes, sir; the amount would increase the fees all the time.

Q. You usually get, then, at the reasonable value of attorneys' fees in a sharply contested case by taking from five to ten per
257 cent. of the amount involved?

A. Yes, sir; where it is a collection of that kind you speak of on a bond or note.

Q. Is it at all extraordinary in a case involving ten thousand dollars—say a man's farm worth ten thousand dollars—to have several different firms engaged in the case on one side or the other?

A. Yes, sir; I think it is—several.

Q. Three firms?

A. Yes, sir.

Q. You think it is an extraordinary fact?

A. Yes, sir.

Q. Suppose the amount involved was fifty thousand dollars. Have you participated in cases of that amount?

A. Very rarely. I have had one. I had one at one time larger than that.

Q. Is it very extraordinary for several attorneys to appear on one side of a case involving fifty thousand dollars?

A. No, sir; I don't know that it is.

Q. Is it not customary for more than one attorney to appear in all cases of any importance at all?

A. Yes, sir; it is.

Q. A difficult matter for one man to take charge of a case of any importance?

A. Yes, sir; most always more than one in an important case.

Q. Now, then, when an attorney charges a fee, Mr. Vance, is it not very difficult for his client to get rid of paying it if it is at all within reason?

A. Yes, sir.

Q. If he don't pay it, he has an opportunity of having another lawsuit on his hands?

A. Yes, sir.

Q. When a man makes a contract calling for property—for the sale of property worth five hundred and fifty thousand dollars—and he is unable to comply with his contract and turn that property over in accordance with his contract, is he not ordinarily liable to a great big suit for damages?

A. I presume he is; yes, sir.

Q. How high might a suit for damages be brought in a case of that kind?

A. According to whatever damages might be suffered.

Q. Might it not be brought for a sum as high as three or four hundred thousand dollars?

A. Yes, sir.

Q. And in a damage suit of that kind a man would be compelled to pay out pretty good attorneys' fees to defend him?

A. Yes, sir.

Q. Especially if there was a good case against him for damages?

A. Yes, sir.

Q. When a person seeks the specific performance of a contract and gets judgment or a decree enforcing that contract what recourse has the party against him? The decree is obtained for the purpose of collecting the money which is due him upon that decree, provided the person who gets it is not willing to do it voluntarily.

A. I don't know whether I understand that or not.

Q. Suppose you sue me for the specific performance of a contract and want to compel me to deliver to you a farm, and the farm is worth ten thousand dollars, and you say you are willing to pay the ten thousand dollars, and you get judgment against me for the specific performance of the contract, and then I am willing to perform and then you are unwilling to pay, what recourse would I have against you to get the money?

A. You don't have to perform. The performance of the contract—the decree of that kind decrees both sides of the contract, and you

are protected just the same way under that decree as you were in the contract you made.

Q. Suppose when you got a decree, the court is willing to render you judgment, you say, "I haven't got the money; I did have the money, but it is gone." What recourse would I have against you?

A. I cannot conceive a decree that would compel you to convey. If I can't pay the money, you wouldn't have to convey; you
258 wouldn't have any redress.

Q. I wouldn't be compelled to convey, but suppose after you got judgment against me I was then willing to convey and tendered it to you and you said, I haven't got the money. You are not compelled to put up a bond when you bring suit for specific performance, are you?

A. Certainly not.

Q. Conditioned that you will comply with the decree of the court?

A. Certainly not.

Q. If you haven't got the money and can't pay me, what recourse have I got against you?

A. Haven't got any. I never heard of such a thing as that.

Q. It could possibly occur, couldn't it?

A. I don't see how it could be possible.

Q. Because a man brings a suit to require specific performance of a contract, is that any assurance that he has the money to comply with the terms of the decree?

A. In the trial of that kind of a case when the court makes a decree of specific performance of a contract it protects both parties, and in the performance of that decree the contract will be carried out upon both sides, and if any money was to be paid, before your rights are disturbed at all by any act you do under that decree, you will be protected by the money being paid; otherwise you will stand as you originally did.

(Witness excused.)

F. D. FULLER, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

Questions by Mr. HISTED:

Q. State your name and residence.

A. F. D. Fuller; Topeka.

Q. What is your occupation?

A. Attorney.

Q. Practicing law here in Topeka?

A. Yes, sir.

Q. How long have you been engaged in the practice here in Topeka?

A. Since 1889.

Q. You heard this long question I read?

A. Yes, sir.

Q. I want to ask you the same question based upon that hypo-

thetical proposition. What, in your opinion, under all the facts and circumstances set forth in that, would be a reasonable compensation for all of the attorneys for all the defendants in the case in the injunction branch of it, bearing in mind the ground and various points affecting the jurisdiction of the court?

A. I should say five thousand dollars would be a very fair fee.

Q. For all the attorneys for all the defendants?

A. In the injunction proceedings; yes, sir.

Q. And with reference to all the injunction proceedings?

A. Yes, sir.

Q. What, in your opinion, under the same facts and circumstances, would be a reasonable and fair compensation for attorneys in going to Little Rock and procuring a dissolution of that temporary injunction before Judge Caldwell?

A. I should think for that phase of it three thousand dollars.

Q. Do you mean by that for all the attorneys?

A. Yes, sir.

Q. For all the defendants?

A. Yes, sir.

Cross-examination.

Questions by Mr. LOOMIS:

Q. In a case like the one first propounded to you, what, in your judgment, would be a reasonable attorneys' fee for the attorneys representing Mr. Mulvane exclusively?

A. I can hardly get from my mind the association that has been brought into it by the testimony in the case—that is, by the questions you proposed and by what Mr. Histed has. With that explanation I would say the same fee would apply to Mr. Mulvane, that he seemed to have control of the whole thing.

Q. Did you hear the question I propounded?

259 A. Not that question. I mean since that.

Q. You mean the questions propounded to Mr. Vance?

A. No, sir; to Mr. McFarland and Mr. Hagan.

Q. You would think that how much would be a reasonable charge to make for services performed for Mr. Mulvane exclusively?

A. As I understand the statements made and all I listened to is that Mr. Mulvane's case was the case of all parties, and therefore I say the same amount.

Q. And for the services at Little Rock, how much should Mr. Mulvane's attorneys charge for that?

A. With the same explanation, I would say the same amount, three thousand dollars.

Q. Have you ever been connected with a case involving half a million dollars?

A. Not quite that; no, sir.

Q. In a suit involving five thousand dollars, sharply contested, if you were successful, what would be a reasonable attorneys' fee?

A. That would depend upon the party I was working for.

Q. What difference would that make?

A. If I had been attorney for a man in a good many cases and he had given me a good deal of litigation, that would modify it some.

Q. If he were a new client and you want to keep him, would that affect the amount?

A. No; I would make a fair charge.

Q. Would you take into consideration the financial standing of the party you were making the charge against?

A. That would be something; yes, sir.

Q. Would you charge more for the same services for a capitalist than for a widow?

A. I certainly would if the widow had a hard time to get along and depended on what she got from that case for support.

Q. Does it make any difference as to the standing of attorneys employed in a case?

A. Quite a difference; yes, sir.

Q. Can an attorney of established reputation and long experience charge more for a given service than any inexperienced attorney?

A. He can charge more.

Q. Is it customary?

A. I think it is; my experience has been that it is.

Q. As a general thing, I wish you would state whether or not it is a difficult thing, after an injunction has been granted by a trial court, to obtain its dissolution?

A. It is; yes, sir; by that same court.

Q. When an injunction is granted and bond given, how long is the injunction good?

A. It depends upon the term of the injunction order.

Q. Don't it ordinarily continue until the merits of the case are disposed of?

A. Yes, sir.

Q. An equity case or chancery case in the Federal court is apt to hang on a long time?

A. Yes, sir.

Q. And where a temporary injunction is granted in a case of that kind it is apt to tie a man up for that time?

A. Yes, sir; that case, that particular case.

Q. And in the Federal court or in any other court, for that matter, when a judge is acting upon a matter—has a case under charge or consideration—is it a very difficult thing to get another judge of equal jurisdiction to take the case up and pass upon it?

A. I think so, usually.

Q. Take a case where Judge Foster granted a temporary injunction in Topeka after full consideration, is it not quite a big undertaking to get Judge Caldwell, at Little Rock, to act upon the same matter and dissolve the injunction?

260 A. Not with Judge Caldwell. My opinion of him is he don't have a very great opinion for any of the judges except as ordinary people.

Q. He has always been willing to act for you, notwithstanding any other judge has acted?

A. Yes, sir; that is the case.

Q. Do you mean matters that have been already passed upon by Judge Foster?

A. In probably one case; yes, sir. I heard him come in and sail into Judge Foster with a considerable amount of—I don't know how to term it.

Q. And overrule him in a matter?

A. Yes, sir.

Q. Weren't you surprised at his taking that action?

A. I was surprised. That was my first experience with Judge Caldwell. I learned afterwards he was rather inclined to be rough.

Q. Being rough is one thing and having jurisdiction of a case that another court has jurisdiction of is another.

A. I expect he thinks this way: He is circuit judge and Foster simply sits as judge.

Q. I want to read my hypothetical question, Mr. Fuller, and get your answer to it.

261 Q. What, in your opinion, would be a reasonable attorneys' fee for legal services rendered under the following state of facts: Upon December 14, 1899, Wescott & Hanson entered into an agreement with Joab Mulvane whereby Mulvane was to convey to them all of the capital stock of the Topeka Water Supply Company for the sum of five hundred thousand dollars. Sixty thousand dollars of this amount was to be paid in cash upon the execution of a formal contract. Two days afterwards the parties met for the purpose of executing the formal contract. At that time Wescott & Hanson refused to make the sixty-thousand-dollars cash payment in accordance with the agreement of December 14th, and Mr. Mulvane declared the contract off. He thereupon entered into a contract with Coffin & Stanton and Woodbury & Moulton to convey to them the capital stock of the Topeka Water Supply Company for the sum of five hundred and fifty thousand dollars. A fifty-thousand-dollars cash payment was made to Mr. Mulvane. The balance, amounting to five hundred thousand dollars, was to be paid and the capital stock of the water company was to be delivered by Mr. Mulvane to the purchasers upon February 10, 1890. Five days before the contract between Coffin & Stanton and Joab Mulvane was to be consummated, to wit, upon February 5th, 1890, Wescott & Hanson brought suit against Mulvane and others in the circuit court of the United States for the district of Kansas for the purpose of specifically enforcing the agreement entered into between them and Mulvane, above referred to, and for the purpose of enjoining the execution of the contract entered into between Mulvane and Coffin & Stanton *et al.* A restraining order without bond was issued upon the filing of the suit, restraining Mulvane from carrying out his contract with Coffin & Stanton pending the hearing upon an application for a temporary injunction, which was set for February 12, 1890. At the time Mr. Mulvane entered into the contract with Coffin & Stanton *et al.* he (Mulvane) had secured, in addition to the stock owned by him, options on about

thirty-four hundred shares of the capital stock of the water company at par, the par value of each share being one hundred dollars. These options would have enabled Mr. Mulvane to have secured the stock and carried out his contract with Coffin & Stanton if the execution of the contract had not been enjoined. When the temporary injunction was issued Mr. Mulvane found it necessary to make absolute purchases of the shares of stock for which he had options, and to do so was compelled to incur obligations amounting to about three hundred thousand dollars, for which short-time notes were given. Mr. Mulvane's financial condition was such at the time the temporary injunction was granted that if it had been continued in force until the end of the litigation on the merits, or if it had not been dissolved within a short time after it had been granted, he would have been unable to meet his outstanding obligations and would have been bankrupted. To enable him to carry out his contract with Coffin & Stanton and others and to prevent his absolute bankruptcy, Mr. Mulvane employed Eugene Hagan, J. D. McFarland, and Hurd & Dunlap, lawyers of this city, for the sole purpose of preventing the allowance of the injunction and to obtain its dissolution if one should be granted. These lawyers made full preparations to oppose the issuance of a temporary injunction and did oppose it to the best of their ability. One of the grounds urged against an injunction was that Woodbury & Moulton, who were par-
262 ties to the contract enjoined, were necessary parties defendant; that one of them was a citizen of the same State as one of the complainants, and when made a party defendant the court would be ousted of its jurisdiction. Another point urged was that complainants had no contract with Mulvane which could be enforced, and therefore that they were not entitled to an injunction. After full argument and consideration, Judge Foster granted a temporary injunction (*injunction*) upon February 13th, 1890, and fixed the bond at seventy-five thousand dollars, which was given. Immediately thereafter motions were filed to dissolve the injunction and preparations made to call up the motions before Judge Caldwell at Little Rock. An effort was also made by Mulvane's attorneys, before Judge Foster, to have Woodbury & Moulton, who were citizens of the same State as one of the complainants, brought into the case as parties defendant and thereby oust the court of its jurisdiction. Judge Foster, however, ruled against Mulvane on this point. After the temporary injunction was granted and before the effort was made to have Woodbury & Moulton made parties defendant, A. L. Williams, lawyer of Topeka, was also employed by Mr. Mulvane for the purpose of assisting in procuring a dissolution of the temporary injunction. The motions to dissolve were fully argued before Judge Caldwell at Little Rock and the injunction dissolved upon the ground that Woodbury & Moulton were necessary parties defendant; that when they were brought into court jurisdiction of the case would be lost, because one of them was a citizen of the same State as one of the complainants. The complainants, Wescott & Hanson, were representing other parties in the negotiations with Mr. Mulvane for the purchase of the Topeka Water Company

stock; they were not to invest a dollar of their own money in the deal; and when it came to carrying out the preliminary arrangement made upon December 14, 1889, by executing a more formal contract, the parties whom Wescott & Hanson represented refused to make the sixty-thousand-dollars payment in accordance with the terms of the agreement. There were other defendants in the case, and the attorneys employed by Mr. Mulvane, in pursuance of such employment, appeared for them in order to better protect Mr. Mulvane's interests and prevent the allowance of the temporary injunction. They were not employed by these other defendants and made no charge for services against them. In their efforts to prevent the allowance of the temporary injunction and to obtain its dissolution, Mr. Mulvane's attorneys filed answers and other pleadings in the case. After the injunction was dissolved, Mr. A. L. Williams alone appeared as attorney for Mr. Mulvane and tried the case for him on its merits, for which he made a separate charge not connected with the charge made for services rendered in obtaining a dissolution of the injunction. Now, taking into consideration the nature of the case, the amount involved, the results which would probably have flowed from an adverse decision, including a possible lawsuit with Coffin & Stanton *et al.* for breach of contract, the professional standing of the attorneys employed by Mr. Mulvane, the results obtained by them, and all other circumstances connected with the case as stated in the foregoing, what, in your opinion, would have been a fair and reasonable attorneys' fee in the aggregate for the services performed by Mr. Mulvane's attorneys in his behalf in resisting the allowance and obtaining a dissolution of the temporary injunction?

A. I want to ask one question. In your question do you
263 state that the delay in having the contract tied up would involve the solvency of Mr. Mulvane or bankruptcy?

Q. Yes, sir; if it had been tied up for any length of time or if it had been continued to the next term of court.

A. It would have caused him to go into insolvency?

Q. Let me read you that part again: "When the temporary injunction was issued Mr. Mulvane found it necessary to make absolute purchases of the shares of stock for which he had options, and to do so was compelled to incur obligations," etc. Do you call it to mind?

A. On that statement of facts I should say that ten or twelve thousand dollars, possibly a little more than that, would be a fair fee in the case. Some might charge fifteen thousand dollars. That would be a good fee, a large fee.

Q. Would that be a good fee, taking into consideration the standing of the attorneys and all the facts stated in this question?

A. I think that would be a large fee—fifteen thousand dollars—but I think ten to twelve thousand dollars would be a fair fee.

(Witness excused.)

It is now admitted, in open court, by and between the parties to this action that within the time allowed, as shown by the printed record which has been introduced, complainants Wescott & Hanson prosecuted an appeal from the decision of the United States circuit

court to the United States circuit court of appeals and gave the bond that is required in the order and otherwise perfected their appeal, and that the case was pending on appeal in the United States circuit court of appeals at the time of the commencement of this suit on the injunction bond and remained pending there for some time after, when it was decided.

Here the defendant rested his case.

Thereupon the plaintiff, to further maintain the issues upon his part, produced and offered evidence in rebuttal as follows:

Counsel for the plaintiff again brought to the attention of the court and offered in evidence the opinion of the United States circuit court of appeals in the case of Wescott & Hanson *vs.* Mulvane.

Counsel for the defendant objected to said opinion as incompetent, irrelevant, and immaterial, because the same was rendered long subsequent to the commencement of this action and because it forms no part of the record in said case.

The COURT: I have been thinking over this matter considerably since the offer of this opinion was first made and have concluded to admit it in evidence. The objection will therefore be overruled.

The defendant excepted to the ruling of the court.

Said opinion was read to the court and jury and is in words and figures as follows, to wit:

(Circuit Court of Appeals, Eighth Circuit, October 16, 1893.)

WESCOTT ET AL. *vs.* MULVANE. } No. 230.

1. Specific performance—Tender by complainant.—An agreement to sell the whole capital stock of a corporation, the first payment to be made in cash on the subsequent signing of a mere formal contract, there being no stipulation as to time of delivering the stock, is not specifically enforceable when the purchaser has failed to tender the first payment as agreed, demanding that the stock should be first deposited in a bank.
2. Same—Injunction—Dissolution.—Where under a bill for specific performance of a contract of sale complainant after securing a temporary injunction against a sale to other parties withdraws "so much of the bill as seeks specific performance," with the understanding that if the court finds him entitled to specific performance it shall award damages in lieu thereof, it is then proper to dissolve the injunction, since it could only be awarded as incident to the relief originally sought.

Appeal from the circuit court of the United States for the district of Kansas. In equity.

Suit by George P. Wescott and Samuel Hanson against
264 Joab Mulvane for specific performance of a contract. The court below dismissed the bill and complainants appeal. Affirmed.

W. H. Rossington and Charles Blood Smith (E. J. Dallas, on the brief), for appellants; A. L. Williams, for appellee.

Before Sanborn, circuit judge, and Thayer, district judge.

THAYER, *District Judge:*

This was originally a bill filed by the appellants against the appellee to specifically enforce the following contract:

"BOSTON, *December 14th*, 1889.

"GENTLEMEN: I will sell you the entire capital stock of the Topeka Water Supply Company of Topeka, Kansas, which consists of four thousand shares of par value of one hundred dollars per share, for the sum of five hundred thousand dollars ($5,000,000.00) on the following terms of payment, viz: The sum of sixty thousand dollars ($60,000.00) to be paid in cash on the signing of a contract to be made and entered into as of this date, the consideration named in said contract to be four hundred and forty thousand dollars ($440,000.00), to be paid as follows, viz: The sum of two hundred thousand dollars ($200,000.00) to be paid February tenth, 1890, one hundred and forty thousand dollars (140,000.00) to be paid February twentieth, 1890, and one hundred thousand dollars (100,000.00) to be paid March twentieth, 1890, provided that final payment of the last-named sum of one hundred thousand dollars may be paid on February twentieth, 1890, if said Wescott and Hanson may elect so to do, by giving me five days' notice of such intention. Payments to be made for and delivery of said stock to be made at the National Bank of North America in the city of Boston, Mass.

"JOAB MULVANE.

"To George P. Wescott, Samuel Hanson."

"We hereby accept your offer to sell the entire capital stock of the Topeka Water Supply Company for the price and on the terms and conditions above stated.

"GEO. P. WESCOTT.
"SAMUEL HANSON."

Other persons and corporations besides the appellee were at first made parties defendant, with whom, as the bill charged, the appellee had entered into negotiations after the execution of the foregoing contract with a view of forming a new corporation, known as the Topeka Water Company, and transferring to it the property and franchises of the Topeka Water Supply Company and capitalizing such new corporation at a sum largely in excess of the sum which the appellants had agreed to pay for the stock of the Topeka Water Supply Company. A preliminary injunction against all of said original defendants was prayed for and obtained on the filing of the bill, restraining them, in substance, from carrying out the negotiations aforesaid, and from putting on the market any of the securities of the new corporation, and from canceling the stock of the Topeka Water Supply Company, and from transferring its franchises and property to the new company. A motion to dissolve that injunc-

tion was subsequently made, and on a hearing of the same it was sustained, and the injunction was thereupon dissolved. Afterwards a stipulation was made and filed in the case, whereby the bill was dismissed as to all of the defendants except the appellee. This stipulation contained, among other things, the following clauses:

"(2.) Complainants hereby withdraw so much of their bill as seeks a specific performance of the alleged contract between complainants and Joab Mulvane described in said bill of complaint."

"(4.) Nothing contained in this stipulation shall be construed in any way as an admission that complainants' bill was improperly brought for specific performance."

"(5.) Nothing contained in this stipulation shall enlarge or lessen or in any manner affect the rights or remedies of complainants against Joab Mulvane in this suit or in any other action except as contained in paragraph two hereof."

The bill appears to have been thereafter retained by consent of all parties, with the understanding that the case should be tried and that damages should be assessed by the court in lieu of
265 a decree of specific performance as for a breach of said contract if the court was of the opinion that the appellants were originally entitled to specific performance. Considerable testimony was thereupon taken, and on final hearing the circuit — dismissed the complaint. We shall indulge in no criticism of the regularity or propriety of the foregoing proceedings. The case having been argued in this court upon the evident assumption that the parties had a right to thus turn a proceeding in equity into a suit at law, and to make the damages dependant upon the question whether there was an original right to specific performance, we shall proceed to consider and treat the case upon that theory, the question being whether, in view of all the circumstances attending the making and execution of the agreement, it was one which a court of equity would specifically enforce. The contract was executed in the city of Boston, late in the evening of Saturday, December 14, 1889, but there had been some preliminary negotiations between the parties at Topeka, Kansas, on the 12th of the preceeding November. The appellants resided respectively at Portland, Me., and Boston, Mass., while the appellee resided at Topeka, and was the chief executive officer and a large shareholder in the Topeka Water Supply Company. The testimony shows that the parties had met by appointment in the city of Boston on the day the contract bears date, and that they had had a lengthy conference before it was finally signed. In the course of that interview the defendant informed the complainants that he had not as yet succeeded in obtaining control of certain shares of stock of the Topeka Water Supply Company, of the par value of twelve thousand dollars; that the residue of the stock was within his control, but that he only had shares of the par value of forty thousand dollars with him; that he must have sixty thousand dollars cash in hand on signing the contract, and that a Mr. Burr, who was president of a Boston bank, would probably be willing to guaranty that the payment of the sixty thousand dollars would be a safe thing to do under these circumstances. With this

information the contract above set out was drawn and signed and the parties separated to meet on the following Monday, December 16, 1889. When the parties met on the succeeding Monday the appellants submitted a form of contract to be signed by the appellee in pursuance of the stipulation in the preliminary contract above set out, which provided that sixty thousand dollars should be paid to the defendant on the signing of the same, but which also contained a provision that the defendant should "at once place in the hands of the cashier of the National Bank of North America, in the city of Boston, Mass., the certificates representing the entire capital stock of the Topeka Water Supply Company." They further informed the defendant that the Mr. Burr referred to had refused to give the above-mentioned guaranty, although he had given him "a high recommendation for integrity and financial ability." Thereupon a long controversy appears to have ensued, in which the complainants undoubtedly took the ground that they ought not to pay the sixty thousand dollars unless the entire stock of the water supply company was first deposited in the National Bank of North America, while the defendant contended that that was an evasion of the terms of the provisional agreement of December 14, 1889, and that the sixty thousand dollars should be forthwith paid, and that the complainants should trust to his ability to make good his promise to deliver the stock. Not being able to come to an understanding, the parties separated and the negotiations came to an end. It is perfectly obvious, we think, from an inspection of this record, that the complainants at no time tendered to the defendant the sum of sixty thousand dollars at the National Bank of North America, in the
266 city of Boston or elsewhere, or ever professed a willingness to pay him that sum until he had deposited the entire capital stock of the water supply company in the Boston bank aforesaid, which deposit of stock, as the complainants well knew, the defendant was not prepared to make. Under these circumstances we must conclude, as the circuit court appears to have done, that the complainants were not entitled to a specific performance of the contract, for the reason that they had never placed the defendant in default by tendering to him the sum which he was entitled to receive before the delivery of any stock. The fact seems to be that the contract of December 14, 1889, was intended as a brief statement of the more important stipulations that were to be embraced in a contract to be subsequently drawn which should cover all the details of the transaction, but when this subsequent contract was drawn and presented it was found that it did not express the intentions of one of the parties at least as to the matter of the delivery of the stock, concerning which nothing had been said in the original agreement except by implication. We are not disposed, however, to question the proposition that the contract counted upon in the bill is a complete contract, nor the further proposition that such an agreement may be specifically enforced. For present purposes both of these propositions may be conceded; but, conceded them to be well founded, we are nevertheless of the opinion that the agreement called for the

payment of sixty thousand dollars before the defendant could be required to deliver any stock, and as no money was tendered he is not shown to have been at any time in default. It is assigned for error that the circuit court erred in dissolving the temporary injunction as well as in dismissing the bill on the ground heretofore stated. As the first of these assignments was somewhat pressed on the argument, it becomes necessary to say, and we think — is all sufficient to say, that the appellants cannot be heard to complain in this court of the order dissolving the temporary injunction after voluntarily withdrawing so much of their bill as sought a specific performance of the alleged contract. An injunction could only be awarded as an incident to that species of equitable relief, and when the allegations and the prayer of the bill looking to that form of relief were withdrawn the injunction necessarily shared the same fate. Finding that — no error in the record, the decree of the circuit court is in all things affirmed.

Mr. Loomis: If the court please, we now renew our offer in evidence of the mandate of the United States circuit court of appeals in the case of Wescott and Hanson *vs.* Mulvane, which shows the precise time of the order of that court.

Counsel for the defendant objected to said mandate as incompetent, irrelevant and immaterial, and because the same occurred long subsequent to the commencement of this action. The court overruled the objection; to which ruling of the court the defendant at the time excepted and still excepts.

Thereupon said mandate was read by counsel for the plaintiff to the court and jury, and the same is in words and figures as follows, to wit:

"United States of America, *ss.*:

[SEAL.] The President of the United States of America to the honorable the judges of the circuit court of the United States for the district of Kansas, Greeting:

Whereas lately, in the circuit court of the United States for the district of Kansas, before you or some of you, in a cause between George P. Wescott and Samuel Hanson, complainants, and Joab Mulvane, defendant, wherein the decree of the said court entered in said cause on the 26th day of September, A. D. 1892, is in the following words, viz:

"This cause having heretofore been dismissed as to all of the above-named defendants except the said Joab Mulvane, on this day came on to be heard, upon the bill of complaint herein, the
267 answer thereto of the said defendant, Joab Mulvane, the replication of the complainants to said answer, and the evidence taken and filed in said cause, and having been argued by counsel for the respective parties:

Now, therefore, on consideration thereof, it is ordered, adjudged, and decreed that the said complainants' bill of complaint be, and the same is hereby, dismissed, with costs to the said defendant, Joab Mulvane, to be taxed.

Thereupon said complainants pray an appeal to the circuit court of appeals, which is allowed.

Thereupon, upon application of said complainant, supersedeas bond is fixed at the sum of one thousand dollars and appeal allowed,' as by the inspection of the transcript of the record of the said circuit court, which was brought into the United States circuit court of appeals, eighth circuit, by virtue of an appeal, agreeably to the act of Congress in such case made and provided, fully and at large appears;

And whereas, in the present term of May, in the year of our Lord one thousand eight hundred and ninety-three, the said cause came on to be heard before the said United States circuit court of appeals on the said transcript of record, and was argued by counsel;

On consideration whereof it is here ordered, adjudged, and decreed by this court that the decree of the said circuit court in this cause be, and the same is hereby, affirmed, with costs, and that Joab Mulvane recover against George P. Wescott and Samuel Hanson the sum of twenty dollars for his costs herein, and have execution therefor, October 16, 1893;

You, therefore, are hereby commanded that such proceedings be had in said cause as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the eighteenth day of December, in the year of our Lord one thousand eight hundred and ninety-three.

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals, Eighth Circuit."

Here the plaintiff rested his case and here the defendant rested his case.

The hour of adjournment arrived, and the further trial of this case was postponed until tomorrow morning at nine o'clock, the jury being duly admonished by the court, as required by law, as to their conduct during the adjournment until tomorrow morning, at which time court met pursuant to adjournment, and the trial proceeded.

Thereupon, the evidence being closed, counsel for the plaintiff presented to the court in writing certain instructions and asked the court to give the same to the jury.

Said instructions are in words and figures as follows, to wit:

"In the District Court of Shawnee County, Kansas.

JOAB MULVANE, Plaintiff,)
vs.
A. J. TULLOCK, Defendant.)

The court is respectfully requested by the plaintiff to give the following instructions to the jury.

A. L. WILLIAMS,
N. H. LOOMIS,
Attorneys for Plaintiff."

I. This is a suit brought by the plaintiff, Joab Mulvane, against the defendants, A. J. Tullock and W. M. D. Lee, upon an injunction bond signed by the defendants, for the recovery of $75,000.00 damages. It appears from the pleadings and the undisputed testimony in the case that upon the 5th day of April, 1890, Geo. P. Wescott and Samuel Hanson brought an action against Joab Mulvane and others in the circuit court of the United States, district of Kansas, to enjoin the execution of a certain contract entered into between said Mulvane and Coffin & Stanton and Woodbury & Moulton, by the terms of which contract Mulvane agreed to sell to Coffin & Stanton and Woodbury & Moulton all of the capital stock of the Topeka Water Company for the sum of $550,000.00; that upon the filing of the bill of complaint in said cause a restraining order was issued by the court restraining and enjoining said Mulvane from carrying out said contract with Coffin & Stanton and Woodbury & Moulton
268 pending the hearing upon the application for a temporary injunction, which was set for argument upon February 12, 1890. It further appears from the pleadings and the undisputed testimony in the case that the temporary injunction was afterwards granted, enjoining the carrying out of said contract between Mulvane and Coffin & Stanton and Woodbury & Moulton until the final hearing in the case, and that upon the granting of this injunction the court ordered that a bond in the sum of $75,000.00 be given by the complainants Wescott & Hanson for the protection of the defendants, against whom the injunction was issued. An order was afterwards made by the court permitting $75,000.00 in cash to be substituted in lieu of a bond. Afterwards the court permitted the cash to be withdrawn and a bond substituted in its place. It is upon this bond that the present suit was brought by Mulvane against Tullock and Lee. It further appears that from the pleadings and the undisputed testimony in the case that said temporary injunction was afterwards and upon the 14th day of April, 1894, dissolved, and that upon the — day of October, 1894, a stipulation was entered into whereby so much of plaintiffs' bill in said case of Wescott & Hanson *vs.* Mulvane *et al.* as sought a specific performance of the contract therein set forth between the complainants and Joab Mulvane was withdrawn, and *and* the said case was thereupon proceeded with as an ordinary suit for damages. The injunction bond upon which this suit is based was conditioned for the payment to the defendants in the case of Wescott and Hanson *vs.* Joab Mulvane *et al.*, above mentioned, and to each of them, all damages which they or either of them had already sustained at the time said bond was given, or might at any time sustain by reason of the granting or issuing of the restraining order above referred to, or the granting and issuing of said temporary injunction, if it should be finally decided that said restraining order or said injunction ought not to have been granted. No service of process has been made in this case against the defendant W. M. D. Lee, and plaintiffs are proceeding, as they have a right to, against the defendant A. J. Tullock alone.

II. The jury are instructed that the action of the United States circuit court for the district of Kansas in dissolving the temporary

injunction in the case of Wescott and Hanson *vs.* Joab Mulvane *et al.*, above referred to, was made final by the voluntary withdrawal by complainants in that case, on the 17th day of October, 1890, of so much of their bill as sought a specific performance of the alleged contract, and that thereafter the said Joab Mulvane had the right to maintain a suit upon said injunction bond to recover whatever damages he might be entitled to thereunder.

III. The jury are instructed that the only question for them to determine in this case is as to the amount of damages which the plaintiff is entitled to recover against the defendant A. J. Tullock.

IV. The jury are instructed that the plaintiff Joab Mulvane is entitled to a verdict against the defendant A. J. Tullock for all damages which he has sustained by reason of the granting or issuing of said restraining order in the case of Wescott & Hanson *vs.* Joab Mulvane *et al.*, above referred to, and the granting and issuing of said temporary injunction; which damages would include the following items:

1. All reasonable and necessary fees of attorneys employed by the said Joab Mulvane for services performed in his behalf in defending against and procuring the dissolution of the injunction in said case.

2. All reasonable and necessary expenses not included in the item of attorneys' fees incurred by the said Joab Mulvane in defending against and procuring a dissolution of said injunction. Under this head would come court costs, reasonable and necessary traveling and hotel expenses of Mulvane and his attorneys, as well as the reasonable and necessary traveling and hotel expenses of any per-
269 sons whom Mr. Mulvane may in good faith have employed for the purpose of enabling him to prevent the allowance of the injunction or to obtain its dissolution, or for the purpose of avoiding any losses or damages which were reasonably liable to flow from the allowance of the injunction.

3. Interest at the rate of six per cent. per annum on whatever sum the jury find was due from Coffin & Stanton and Woodbury & Moulton to Joab Mulvane on the contract above referred to on the tenth day of February, 1890, and which the said Joab Mulvane may have been prevented from collecting by reason of said restraining order and temporary injunction up to the date of the dissolution of said temporary injunction, which was the 14th day of April, 1890.

4. Interest on all payments made by Mr. Mulvane and for which the jury may find he is entitled to recover under these instructions, from the dates of payment to the date of verdict, at the rate of six per cent. per annum.

The court refused to give to the jury any one of the instructions so requested by the plaintiff and refused to give any part thereof; to which action and refusal of the court the plaintiff at the time excepted.

Thereupon counsel for the defendant presented to the court certain instructions in writing and asked that they be given to the jury. Said instructions are in words and figures as follows, to wit:

MULVANE)
vs.
TULLOCK.)

The defendant requests the court to instruct the jury:

I. The burden of proof is upon the plaintiff in this case to establish that at the time of bringing this suit it had been finally decided that the said temporary injunction in the case of Wescott & Hanson *vs.* Mulvane *et al.* was unlawfully issued, and that said complainants were not entitled to the said injunction. If you find from the evidence that the circuit court of the United States had prior to the bringing of this suit entered a final judgment and decree in favor of the defendant Mulvane and against Wescott & Hanson, but that thereafter and within the time allowed therefor the said Wescott & Hanson had prosecuted an appeal from said judgment and decree to the United States circuit court of appeals and had perfected said appeal and said appeal was pending in said United States circuit court of appeals at the time of the bringing of this suit, then and in that event this action was prematurely brought and your verdict must be for the defendant.

II. The plaintiff is not entitled to recover anything in this action on account of attorneys' fees.

III. The plaintiff is not entitled to recover anything in this action on account of expenses claimed to have been incurred by the plaintiff in the way of traveling expenses and fees to the clerk of the court — hotel bills.

IV. The plaintiff is not entitled to recover in this action for anything on account of interest on such damages as you find he sustained by reason of the granting of said temporary injunction.

V. The plaintiff is not entitled to recover in this action for interest on the amount of the contract price agreed to be paid to him by Coffin & Stanton for the water-works property.

VI. In order to entitle the plaintiff to recover for any interest upon the deferred payment of the contract price from Coffin & Stanton to him, he must establish by a preponderance of the evidence that the delay in such payment was caused solely by reason of the fault of Wescott & Hanson, and that but for the action which they took it would have been paid by Coffin & Stanton and no such delay would have occurred.

VII. The plaintiff is not entitled to recover anything in this action on account of attorneys' fees for services rendered in resisting the application of Wescott & Hansons for a temporary injunction.

VIII. The only attorneys' fees which the plaintiff is entitled to recover in this action are for legal services rendered plaintiff in procuring a dissolution of the injunction.

270 IX. If you find from the evidence in this case that a gross counsel fee was paid by plaintiff for the services rendered by the various attorneys in the suit, and that said attorneys rendered services in said cause on addition to the services in the injunction branch of the suit, and no separate or distinct amount of money was paid to the attorneys for services in relation to the injunction, and

no special charge was made therefor, the plaintiff is not entitled to recover anything on account of counsel fees.

X. The plaintiff, in any event, is entitled to recover for such reasonal le attorneys' fees as were necessarily incurred by him alone in procuring a dissolution of the temporary injunction. He was not authorized to recklessly or extravagantly employ a large number of attorneys and agree to pay them large or extravagant fees with a view of saddling such expense upon the parties to the injunction bond.

XI. The measure of attorneys' fees in any case are the fees usually obtained by attorneys of similar experience and standing for like services in the same courts or in the same vicinity in which the services were rendered.

XII. If you find from the evidence in this case that there were joined with Joab Mulvane as defendants in the suit of Wescott & Hanson against them in the United States circuit court a number of other defendants, who filed pleadings in the case and proceeded as if they had distinct interests and rights to protect, and that thereafter and after the dissolution of said temporary injunction said defendants, other than Mulvane, for a sufficient consideration, released the plaintiffs from all liability upon the injunction bond, and at the time of obtaining such release the said Wescott & Hanson had no knowledge of any claim on the part of said Mulvane that he had agreed to assume the entire burden of the defense against the injunction, and in pursuance of that agreement had paid the fees of the attorneys and appeared for his codefendants, then and in that event the plaintiff Mulvane is not entitled to recover in this action anything on account of attorneys' services rendered for any of the other defendants in said suit who signed said release or for expenses incurred on their behalf in and about the dissolution of said injunction.

XIII. If a gross fee was charged and paid to the attorneys for services rendered all of the defendants in the case and no separation or apportionment of the same was made between Mulvane and the other defendants, the defendant Mulvane is not entitled to recover for said fees."

The court refused to give to the jury any one of the instructions so requested by counsel for the defendant and refused to give any part thereof; to which action and refusal of the court the defendant at the time excepted.

Thereupon the court of his own motion instructed the jury in writing as follows, to wit:

"JOAB MULVANE, Plaintiff,
vs.
A. J. TULLOCK, Defendant. } No. 17012.

Instructions.

GENTLEMEN OF THE JURY: It is claimed on behalf of plaintiff in this case that on the 5th day of February, 1890, Wescott & Hanson

commenced suit in the United States circuit court for the district of Kansas against this plaintiff, together with other defendants in said action, and procured a restraining order to issue against this plaintiff restraining him from carrying out a certain contract which he alleges he had theretofore entered into with Coffin & Stanton by which this plaintiff was to deliver to Coffin & Stanton certain stock and bonds which it is claimed this plaintiff had agreed to deliver and for which Coffin & Stanton had agreed to pay him five hundred and fifty thousand dollars, fifty thousand dollars of which had already been paid; that a temporary injunction in said suit in the Federal court was granted against this plaintiff and his codefendants, and that Wescott & Hanson were required to and did make a cash
271 deposit of seventy-five thousand dollars in lieu of an injunction bond in said suit; that afterwards and with permission of the court the seventy-five thousand dollars cash deposit was withdrawn by Wescott & Hanson, and they were permitted to and did execute in lieu thereof an injunction bond in the sum of seventy-five thousand dollars; that thereafter such further proceedings were had in said case that the temporary injunction theretofore issued was set aside and abandoned by the plaintiff in that case. The plaintiff avers that by reason of the granting of the injunction in said suit in the Federal court against him he has been damaged, and this suit is brought for the purpose of recovering upon the injunction bond the amount of damage plaintiff claims to have sustained on account of the wrongful issuance of the temporary injunction. The plaintiff claims several different elements of damage, which the court will explain to you further on in this case. The defendant admits the execution of this injunction bond, as alleged, but denies there is any liability on his part on account of the claims of plaintiff. These are, in brief, the respective claims of the parties to this suit, which must be tried and decided according to the law as given you by the court and the facts as you have learned them from the witnesses.

1. The burden of proof in this case is upon plaintiff. It is for him to prove his cause of action by a preponderance of evidence. By a preponderance of evidence is simply meant a greater weight of evidence. When you have weighed all the evidence in this case, if you find there is a greater weight on the side of plaintiff than on that of defendant, then plaintiff has proven his cause of action by a preponderance of evidence, and your verdict should be for plaintiff; but if you find the evidence equally balanced, or if you find there is not a greater weight on the side of plaintiff than on that of defendant, then plaintiff has failed to prove his cause of action by a preponderance of evidence, and your verdict should be for defendant.

2. You are the exclusive judges of the weight of the evidence, of its credit and value. It is for you to say what credit shall be given to the testimony of the various witnesses in this case. It is your duty to reconcile all apparently conflicting testimony upon a basis of truth, if you can do so; but if, after a full and fair consideration, you are unable to do this, then you are authorized to reject such of the testimony as you may deem not entitled to credit and decide the case upon the credible evidence as you understand it.

3. You should not arbitrarily reject without cause or reason the testimony of any witness, but if you find that any witness has knowingly and willfully testified falsely to any material fact in issue, then you may in your discretion disregard the whole of such witness's testimony, although you are not bound to do so; you may still give it such weight and credit as you deem it entitled to under all the facts and circumstances proven.

4. In determining the weight to be given to the testimony of any witness you may take into consideration the manner of the witness upon the stand, the reasonableness or unreasonableness of his statements, the opportunity the witness has of knowing the facts about which he testifies, together with any interest he may have in the result of the suit, if any such interest is shown, together with all the facts and circumstances proven.

5. Where a suit is commenced and a temporary injunction granted and thereafter set aside, the party against whom the injunction is granted may recover upon the injunction bond given whatever actual damage he has sustained by reason of the wrongful issuance of the injunction, and the person against whom the injunction
272 is granted may maintain an action upon the injunction bond for damage sustained at any time after the temporary injunction has been set aside or the injunction branch of the case abandoned by the plaintiff. He is not required to wait until the main action is terminated. In this case, then, if you find from the evidence that prior to the commencement of this suit a temporary injunction had been issued in the case in the Federal court and had been set aside or the injunction branch of the case abandoned by the plaintiffs in that suit, then the defendant or defendants against whom the injunction had been issued could maintain an action to recover the damage sustained by reason of the wrongful issuance of the injunction.

6. It is claimed on behalf of plaintiff in this case that by reason of the commencement of the suit in the Federal court against him he was required to employ attorneys to defend the injunction branch of the case in an effort to prevent the granting of a temporary injunction and in a motion to set aside the temporary injunction granted; that for this purpose he employed Hurd & Dunlap, A. L. Williams, J. D. McFarland, and Eugene Hagan to represent him in the injunction branch of said case and paid them for services so rendered the sum of sixteen thousand dollars; that the employment of these attorneys was necessary, and that the amount paid was a reasonable price for the services rendered in the injunction branch of the case.

7. In a suit on an injunction bond attorneys' fees constitute a proper element of damage, and the person against whom a temporary injunction has been granted has the right to employ a reasonable number of attorneys to represent him in the injunction branch of the case and has the right to pay the attorneys so employed a reasonable compensation for the services so rendered; but a person against whom a temporary injunction has been granted has no right to employ an unreasonable number of attorneys to represent him in the injunction

branch of the case, nor to pay the attorneys employed an unreasonable price for their services, and then recover that amount in a suit upon the bond. What would constitute a reasonable or unreasonable number of attorneys or reasonable or unreasonable fees must be determined from the character of the case, the importance of the questions involved, and the amount in controversy.

8. In this case it is for you to determine from the evidence heard whether the number of attorneys employed by the plaintiff was reasonable number and whether the amount paid was a reasonable amount for such services, because, as hereinbefore explained, the plaintiff can recover as attorneys' fees only the reasonable and customary fees in the community where the services were rendered.

9. If you believe from the evidence in this case that the plaintiff employed the attorneys claimed to have been employed and paid the amounts claimed to have been paid by him, and the number of attorneys was reasonable under all the circumstances of the case, and the amount paid was the usual and customary fees for such services, then I instruct you that plaintiff would be entitled to recover in this action upon the bond in suit the amount paid to his attorneys, with interest thereon, at the rate of six per cent., from the date of payment up to the present time; but if you find from the evidence that the plaintiff employed more attorneys than was reasonably necessary, then you have a right to disallow the amount paid by the plaintiff to such attorneys as you find to have been unnecessarily employed; or if you find that the attorneys employed were reasonable in number, but that plaintiff paid them excessive fees—that is, amounts greater than the usual and customary fees for such services rendered by them—then you would have a right to deduct from the amount paid by plaintiff any excess which you may find to have been
273 so paid.

10. It will be for you to determine in this case, from all the facts and circumstances proven, how much you will allow the plaintiff as attorneys' fees for services rendered for him in the injunction branch of the case in the Federal court.

11. It is further claimed on behalf of plaintiff that on account of the granting of the temporary injunction in the Federal court he necessarily paid out various amounts in telegraphing, in the expenses of his attorneys to Little Rock, and to D. A. Mulvane for certain trips East during the pendency of that suit and for court costs and clerical expenses.

12. As heretofore explained, the plaintiff is entitled to recover upon the injunction bond the actual damage sustained by reason of the granting of the injunction, but any and all expenditures must have been necessary and occasioned by the granting of the injunction, and unless such expenditures are necessary and occasioned by the granting of the injunction they should not be allowed. It will be for you to determine from the evidence in this case whether any or all of these expenditures claimed by plaintiff were necessary expenditures and were occasioned by the injunction. If they were, then they ought to be allowed, but if they were not they should not be

allowed, and if allowed the plaintiff would be entitled to six per cent. interest upon the amounts from date of payment.

13. It is claimed on behalf of plaintiff that he was prevented from complying with his contract with Coffin & Stanton by the issuance of the temporary injunction whereby he was to deliver on February tenth, 1890, the stock and bonds referred to in the evidence and to receive at the dates specified in the contract the five hundred thousand dollars therefor; that by reason of said injunction he was so prevented from the tenth day of February to the fourth day of April, and therefore he claims that he is entitled to recover as damages in this action interest at the rate of six per cent. per annum upon five hundred thousand dollars from February tenth to April fourth.

14. If you believe from the evidence in this case that, by reason of the granting of the temporary injunction, the plaintiff was prevented from carrying out his contract with Coffin & Stanton and thereby deprived of the use of this five hundred thousand dollars during this time, then I instruct you that plaintiff would be entitled to recover upon the injunction bond the damage so sustained, being six per cent. interest upon this amount during that period.

15. It is claimed on behalf of defendant in this case that in the injunction suit in the Federal court there was a number of defendants beside the defendant Mulvane; that all of the defendants in said suit, except the defendant Mulvane, released the defendant in this suit from any liability to them growing out of the granting of the temporary injunction; and it is further claimed that the services rendered by the attorneys representing the defendants in the injunction suit were employed to and did represent all of said defendants, and that the amounts paid by Mulvane were paid on account of and for services rendered for all of the defendants in the injunction suit.

16. The evidence in this case shows that all of the other defendants in the injunction suit have released all claims for damages growing out of the granting of said injunction, and therefore I instruct you that Mulvane could not recover in this action for any money paid on account of services rendered for the other defendants in said suit. Mulvane must be confined in this action and can only recover for money paid out on account of services performed by him, and cannot recover for money paid to attorneys for services performed by them for other of the defendants in the injunction suit.

17. Under the language of the injunction bond sued upon
274 in this case plaintiff would be entitled to recover attorney fees paid out by him in obtaining a dissolution of the injunction, and also for services of his attorneys in resisting the issuance of the temporary injunction, provided the employment of such attorneys was reasonably necessary and the amount paid the usual and reasonable fees for such services.

18. The instructions given are intended to meet the different phases of this case, and therefore you should not select some particular instruction and decide the case alone upon that, but you should take and consider all of the instructions together as being the law applicable to this case generally."

At the time of the giving by the court to the jury of the instructions above set out the plaintiff, for himself, and the defendant, for himself, each separately objected and excepted to each one of said instructions so given and to each and every part of each one of said instructions, and still excepts to the giving thereof.

Thereupon the case was argued by counsel to the jury. In the closing argument before the jury Mr. A. L. Williams, one of plaintiff's attorneys, referred to, explained, and discussed the opinion of the United States circuit court of appeals rendered in the case of Wescott & Hanson *vs.* Mulvane, which had been admitted in evidence, and contended that said suit had been maliciously brought and without probable cause therefor. At the conclusion of the argument the jury retired to the jury-room, and after due deliberation returned into open court with their verdict in favor of the plaintiff and against the defendant. Thereupon there was made upon the journal of the court an entry in words and figures as follows, to wit:

"In the District Court of Shawnee County, Kansas.

JOAB MULVANE, Plaintiff,
vs.
A. J. TULLOCK and W. M. D. LEE, Defendants.

Journal Entry.

Upon this day this cause comes regularly on for trial. The defendant W. M. D. Lee not having been served with process, the case proceeds to trial against the defendant A. J. Tullock alone.

The plaintiff appeared by A. L. Williams and N. H. Loomis, his attorneys, and the defendant A. J. Tullock appeared by Rossington, Smith & Dallas and Clifford Histed, his attorneys.

Thereupon a jury of twelve persons were regularly empaneled and sworn to try said action. Witnesses on the part of plaintiff and defendant were sworn and examined.

After hearing the evidence, the arguments of counsel, and the instructions of the court, the jury retired to consider of their verdict, and subsequently returned into court, and, being called to answer to their names, say they find a verdict for the plaintiff in the sum of twenty-five thousand dollars ($25,000.00), said verdict being in words and figures as follows, to wit:

"'THE STATE OF KANSAS, } ss:
Shawnee County, }

In the District Court, Third Judicial District.

JOAB MULVANE, Plaintiff, }
vs. } No. 17012.
A. J. TULLOCK, Defendant. }

Verdict.

We, the jury impaneled and sworn in the above-entitled case, do upon our oaths find for the plaintiff, Joab Mulvane, and assess his damages against the defendant, A. J. Tullock, in the sum of $25,000.00.

JAMES BURGESS, *Foreman.*'

Wherefore, by virtue of the law and by reason of the premises aforesaid, it is considered, ordered, and adjudged that said plaintiff, Joab Mulvane, do have and recover from said defendant, A. J. Tullock, the sum of twenty-five thousand dollars ($25,000.00), with interest thereon, at the rate of six per cent. per annum, from the date hereof until paid, together with the costs of this action, amounting to the sum of — dollars, for which let execution issue.

To which judgment and decision of the court and to every part thereof the defendant excepts.

Dated June 17, 1898."

Afterwards and on the 18th day of June, 1898, and during the April term of the court and within three days from the rendition of said judgment, the defendant, by his attorneys, filed in the
275 office of the clerk of the court a motion for a new trial, and upon oral application to the court obtained a stay of execution pending the hearing of said motion. Said order of the court, as the same was then entered upon the journal of the court, is in words and figures as follows, to wit:

"In the District Court of Shawnee County, Kansas.

JOAB MULVANE, Plaintiff, }
vs. } No. 17012.
A. J. TULLOCK, Defendant. }

On this 18th day of June, 1898, comes the defendant and files his motion for a new trial in the above-entitled cause, and upon application of the defendant it is ordered that pending the hearing and determination of said motion for a new trial execution be stayed herein.

Z. T. HAZEN, *Judge.*"

Said motion for a new trial which was filed by the defendant is in words and figures as follows, to wit:

"In the District Court of Shawnee County, Kansas.

JOAB MULVANE, Plaintiff,
vs.
A. J. TULLOCK, Defendant. } No. 17012.

Motion for a New Trial.

Now comes the defendant, A. J. Tullock, and respectfully moves the court here to vacate and set aside the verdict of the jury returned in this case and to grant said defendant a new trial therein for the following reasons, affecting materially the substantial rights of said defendant:

First. An irregularity in the proceedings of the court and prevailing party and abuse of discretion by which this defendant was prevented from having a fair trial.

Second. Misconduct of the jury and prevailing party.

Third. Accident or surprise which ordinary prudence could not have guarded against.

Fourth. Excessive damages appearing to have been given under the influence of passion or prejudice.

Fifth. Error in the assessment of the amount of recovery, the same being too large.

Sixth. That the verdict is not sustained by sufficient evidence and is contrary to law.

Seventh. Newly discovered evidence material for the defendant which could not with reasonable diligence have been discovered and produced at the trial.

Eighth. Errors of law occurring at the trial and excepted to by the defendant at the time.

ROSSINGTON, SMITH & DALLAS,
Attorneys for said Defendant."

Afterwards and on the first day of July, 1898, and during the same term of the court, said motion of the defendant for a new trial came regularly on for hearing and was presented and argued by counsel to the court. At the conclusion of the argument the court took said motion under advisement.

Afterwards and on the 6th day of September, 1898, the court announced his decision upon said motion for a new trial, and there was made upon the journal of the court a record thereof in words and figures as follows, to wit:

JOAB MULVANE, Plaintiff,
vs.
A. J. TULLOCK, Defendant. } No. 17012.

Now, on this 6th day of September, 1898, the motion of the defendant for a new trial of this case came regularly on for decision, the same having been heretofore heard and taken under advisement by the court. The plaintiff appears by his attorneys and the defend-

ant appears by his attorneys. Thereupon the court, after due consideration and being well advised in the premises, finds that said motion of the defendant for a new trial should be overruled, and it is therefore ordered by the court that said motion be, and the same is hereby, denied and overruled; to which finding and ruling of the court the defendant excepts.

Upon application of the defendant and for a good cause shown the said defendant is allowed ninety days from this date in which to make and serve upon the plaintiff a case-made for the supreme court, and execution herein is stayed during said ninety days.

This case-made for the supreme court contains full, true, and correct copies of all pleadings, files, and motions in this case; full, true, and correct copies of all orders of the court, journal entries, judgments, and decisions in this case; a full, true, and correct
276 transcript of all testimony and evidence offered and admitted upon the trial of the case and full, true, and correct copies of all exhibits offered or admitted in evidence upon said trial; a full, true, and correct record of all objections, oral motions, and exceptions made or taken during the trial of the case, and a full, true, and correct history of this action and of the proceedings taken herein from the filing of the original petition to the present time. The above and foregoing case-made for the supreme court has been this day served upon us as attorneys for the plaintiff, and we do hereby acknowledge the service of the same.

Topeka, Kansas, October 19th, 1898.

N. H. LOOMIS,
Attorneys for Plaintiff.

In the District Court of Shawnee County, Kansas.

JOAB MULVANE, Plaintiff, }
vs. } No. 17012.
A. J. TULLOCK, Defendant. }

STATE OF KANSAS, }
Shawnee County, } *ss:*

I, Z. T. Hazen, judge of the district court of Shawnee county, Kansas, do hereby certify that the above and foregoing was presented to me as a case-made in the action above entitled; that at the time of such presentation both plaintiff and defendant were represented by their attorneys, and no amendments to said case-made were suggested; and I now settle and sign the same as a true and correct case-made, and direct that it be attested and filed by the clerk of said court.

Witness my hand, at Topeka, in said county and State, this 14th day of November, 1898.

Z. T. HAZEN,
Judge of the District Court of Shawnee County, Kansas.

Attest: E. M. COCKRELL,
Clerk of the District Court of
Shawnee County, Kansas. [SEAL.]

Filed Nov. 19, 1898.

E. M. COCKRELL, *Clerk*,
By I. S. CURTIS, *Deputy*.

277 And also, on the 23rd day of November, 1898, there was filed in the office of the clerk of the supreme court of the State of Kansas a bond for costs, which is in the words and figures as follows, to wit:

278 In the Supreme Court of Kansas.

A. J. TULLOCK, Plaintiff in Error,
vs.
JOAB MULVANE, Defendant in Error.

Security for Costs.

We and each of us enter as security for all costs which may accrue to said defendant in error or to the officers of this court herein; and in default of payment by said plaintiff in error of said costs and after ten days' notice we agree that execution may issue against our property for unpaid costs.

ALONZO J. TULLOCK.
ALBERT J. SCHILLING.

(Indorsed on back:) No. 11319. A. J. Tullock *vs.* Joab Mulvane. Bond for costs. Approved. Filed Nov. 23, 1898. Jno. Martin, clerk supreme court. This bond is perfectly good. Rossington, Smith & Dallas, attorneys for plaintiff in error.

279 And afterwards, on the 8th day of November, 1899, the same being one of the regular judicial days of the July term, 1899, of the supreme court of the State of Kansas, in session at the supreme court room, in the city of Topeka, there being present the Honorable Frank Doster, chief justice; Honorable William A. Johnston and Honorable William R. Smith, associate justices, and D. A. Valentine, clerk of said court, the following proceeding, among others, was had and entered of record as follows, to wit:

280 In the Supreme Court of the State of Kansas.

A. J. TULLOCK, Pl'ff in Error,
vs.
JOAB MULVANE, Def't in Error. } Journal Entry of Continuance.

On motion of R. W. Blair, appearing as attorney for defendant in error, it is ordered that the further hearing of this cause be continued to the February, 1900, session of this court.

281 And afterward, on the 6th day of February, 1900, the same being one of the regular judicial days of the January term, 1900, of the supreme court of the State of Kansas, in session at the

supreme court room, in the city of Topeka, there being present the Honorable Frank Doster, chief justice; Honorable William A. Johnston and Honorable William R. Smith, associate justices, and D. A. Valentine, clerk of said court, the following proceeding, among others, was had and entered of record as follows, to wit:

282 In the Supreme Court of the State of Kansas.

A. J. TULLOCK, Pl'ff in Error, vs. JOAB MULVANE, Def't in Error. } Journal Entry of Submission.

This cause comes on to be heard on petition in error and transcript of the record of the district court of Shawnee county, and thereupon said cause was argued by W. H. Rossington, of counsel for plaintiff in error, and N. H. Loomis, of counsel for defendant in error, and taken under advisement by the court.

283 And afterwards, on the 7th day of April, 1900, the same being one of the regular judicial days of the January term, 1900, of the supreme court of the State of Kansas, in session at the supreme court room, in the city of Topeka, there being present the Honorable Frank Doster, chief justice; Honorable William A. Johnston and Honorable William R. Smith, associate justices, and D. A. Valentine, clerk of said court, the following proceeding, among others, was had and entered of record as follows, to wit:

284 In the Supreme Court of the State of Kansas.

A. J. TULLOCK, Pl'ff in Error, vs. JOAB MULVANE, Def't in Error. } Journal Entry of Decision.

This cause comes on for decision, and thereupon it is ordered and adjudged that the judgment of the court below be affirmed. It is further ordered that the plaintiff in error pay the costs of this case in this court, taxed at $100.00, and hereof let execution issue.

285 And also, on the said 7th day of April, 1900, there was filed in the office of the clerk of the supreme court of the State of Kansas the syllabus and opinion of the court in said cause, which are in the words and figures as follows, to wit:

286 A. J. TULLOCK vs. JOAB MULVANE. } No. 11318.

Error from Shawnee county. Affirmed.

Syllabus—Doster, C. J.

1. Mulvane *v.* Tullock, 58 Kan., 622, affirmed and followed.
2. When a petition claiming damages is not demurrable for insufficiency in its statements of fact to constitute a cause of action, but is only subject to a motion to make it more definite and

certain as to the allegations of damage sustained, and upon a first trial is had in the course of which the plaintiff makes a full disclosure of the several items constituting his demand, it is not error upon a second trial and at the close of the plaintiff's evidence during which the same disclosures were made to allow the petition to be amended by setting out the various items of damages claimed so as to conform to the evidence given. Walker *et al. v.* O'Connell, 59 Kan., 306, distinguished.

3. When an action is brought to compel the specific performance of a contract of sale, and as incident thereto for an injunction to restrain a sale of the property in question to another person, and the plaintiff voluntarily dismisses his action as one for specific performance and elects to continue it as one for damages for non-performance, the dismissal operates as an
287 abandonment of the claim for injunction as well as the claim for specific performance, and an action will at once lie upon the injunction bond given in the case without awaiting the termination of the suit for damages. Brown *v.* Galena Mining & Smelting Co., 32 Kan., 528, distinguished.

4. An order of court dismissing a proceeding for an injunction made upon the application of the party who instituted the proceeding is a final decision that the injunction ought not to have been allowed, and an action will thereupon lie upon the injunction bond. Mitchell *v.* Sullivan, 30 Kan., 231, affirmed and followed.

5. When the judgment in a cause does not clearly disclose the questions at issue and decided, nor does the mandate of affirmance of a reviewing court to which the cause has been appealed make such disclosure, the written opinion of the appellate court may be introduced in evidence to ascertain the issues involved and actually decided.

6. Charges for attorneys' services may be rightfully made in view of the special importance of the litigation to the client, as that the successful termination of the suit has saved him from bankruptcy, and in such case, if the party has made payment of fees to correspond with the special importance of the litigation to himself, and if for any reason the amount paid constitutes a demand chargeable to another person, the special facts showing the importance of the case may be proved, and a hypothetical question as to the value of the services based thereon may be asked of qualified witnesses.

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A. J. TULLOCK)
v.) No. 11318.
JOAB MULVANE.)

Error from Shawnee county. Affirmed.

The opinion of the court was delivered by DOSTER, C. J.:

This is the second time this case has been before us—Mulvane *v.* Tullock, 58 Kan., 622. When first here it was reversed, principally

for the reason that the court below erred in holding that the expen
ture of attorneys' fees in procuring the dissolution of an injunct
in the Federal courts was not recoverable as damages in a suit up
the injunction bond. After the return of the case to the lower co
a trial was had, resulting in a verdict and judgment for the pla
tiff Mulvane in the sum of twenty-five thousand dollars, princip
for attorneys' fees expended by him in procuring a vacation of t
injunction order. The defendant Tullock has prosecuted error
this court.

Summarized, the facts were that Mulvane had contracted to s
to the firms of Coffin & Stanton and Woodbury & Moulton the c
ital stock of the Topeka Water Supply Company for the sum of fi
hundred and fifty thousand dollars. The firm of Wescott & Hans
claimed that Mulvane had previously contracted to sell the sa
stock to them, and they accordingly brought an action in the Unit
States circuit court to compel a specific performance of the agre
ment to sell to them and for an injunction restraining t
289 execution of the contract for the sale and delivery of the sto
to Coffin & Stanton and Woodbury & Moulton. The gran
ing of the order of injunction was resisted by Mulvane. It wa
however, allowed, but was subsequently dissolved by the circu
court. A condition to the allowance of the injunction was the d
posit of seventy-five thousand dollars in money in lieu of an injun
tion bond and as security for the damages the defendants might su
tain. The order for the making of the cash deposit was subsequentl
changed to allow the substitution of an injunction bond. This bon
was given and is the one now in suit. Subsequently an agreemen
was made between the complainants and the defendants by whic
the bill for specific performance was dismissed, but the case wa
allowed to proceed as though at law for damages for non-perform
ance instead of in equity for specific performance. However, it wa
agreed that the stipulation of dismissal should in no manner "en
large or lessen or in any manner affect the rights or remedies of th
said Mulvane against the complainants in this or any other action.
Subsequently the bill for damages was heard and was dismissed wit
costs in favor of the defendant Mulvane. Soon after the making
the order last mentioned suit was instituted upon the injunctio
bond. Subsequently the complainants appealed to the circuit cou
of appeals from the order of dismissal entered in the circuit cour
The circuit court of appeals, upon a hearing, affirmed the order
dismissal made by the circuit court.

The contentions in behalf of the plaintiff in error, stated in th
order made by him, are, first, that attorneys' fees are not allowabl
as damages in a suit on an injunction bond given in a case in th
Federal court, but that in the event of a dissolution of the injunc
tion and the consequent occurrence of a liability upon th
290 bond the court granting the injunction awards damages upo
the bond in a proceeding ancillary to the injunction cas
This was the main contention of Tullock, the surety on the bond
when the case was here before. It was fully considered then an
held to be unfounded. No additional arguments have been ad

vanced or additional authorities cited influencing us to take a different view of the question.

It is next contended that attorneys' fees are not recoverable under the petition as originally framed, and that the court erred in permitting an amendment to the petition specifically itemizing the claim for attorneys' fees and demanding judgment therefor. The claim for damages made in the petition previous to its amendment read as follows: "Plaintiff further alleges that he has received damages caused by the issuance of said injunction in the sum of seventy-five thousand dollars, for which sum of money he prays judgment." No motion to require this petition to be made more definite and certain in respect to the items of damage claimed was made, but upon the allegation above quoted the parties proceeded to the trial first had previous to the reversal of the case before mentioned, as well as to the last trial, from which the present proceeding in error was prosecuted. Upon the first trial the several items of the plaintiff's demand for damages were specifically stated and testified to by him. The defendant became fully aware upon that trial of the particulars constituting the plaintiff's demand for attorneys' fees and other damages. Upon the second trial objections were made to the reception of evidence for the reason that the claim for damages was insufficiently pleaded. The objection was overruled, but at the close of the plaintiff's evidence he asked and obtained leave to amend his petition to correspond with his proof by itemizing the various
291 sums constituting his demand. Although upon the making of the amendment to the petition the plaintiff's counsel asked for a postponement of the trial because of the allowance of the amendment, yet the request was not made upon the ground that they had been misled or surprised by the plaintiff's testimony or the making of the amendment, or that they had been ignorant of the items of the plaintiff's demand and were unprepared with counter-evidence, nor indeed could such claim of surprise or ignorance have been made, because, as before stated, the case had once before been tried and a full disclosure of the plaintiff's demand had then been made. The case in that respect is unlike Walker *et al. v.* O'Connell, 59 Kan., 306, and is unlike it in the further respect that the petition in that case lacked an essential averment—one without which it was demurrable for insufficiency of facts to constitute a cause of action—while in this case the petition as originally framed was not demurrable for insufficiency, but subject only to a motion to make it more definite and certain, which motion, so far as we are advised or the record before us shows, was never made.

It is next claimed that the action was prematurely brought because instituted while the appeal of Wescott & Hanson from the decree of dismissal of their bill was pending in the circuit court of appeals. As before stated, the bill of Wescott & Hanson for specific performance was dismissed by them, and the action thereafter proceeded as one for damages for breach of contract. Although the suit upon the injunction bond was not brought until after the voluntary dismissal of so much of complainant's bill as prayed for specific performance and not until after the trial subsequently had of

the bill for damages and the adverse decision made therein, the plaintiff in error claims that the right of action upon the in-
292 junction bond became stayed as a consequence of the appeal from the order dismissing the bill for damages. This claim is untenable, and especially so in view of the decision subsequently rendered by the circuit court of appeals upon the hearing of the appeal.

In its opinion that court remarked:

"It is assigned for error that the circuit court erred in dissolving the temporary injunction as well as in dismissing the bill on the ground heretofore stated. As the first of these assignments was somewhat pressed on the argument, it becomes necessary to say, and we think it all sufficient to say, that the appellants cannot be heard to complain in this court of the order dissolving the temporary injunction after voluntarily withdrawing so much of their bill as sought a specific performance of the alleged contract. An injunction could only be awarded as an incident to that species of equitable relief, and when the allegations and the prayer of the bill looking to that form of relief were withdrawn, the injunction necessarily shared the same fate."

Wescott *et al. v.* Mulvane, 58 Fed., 308.

In the view of the circuit court of appeals the dismissal of the bill for specific performance was a dismissal of the incident claim for an injunction. In this view we fully concur. The effect of the voluntary dismissal was to abandon the claim for an injunction and to ripen the hitherto contingent liability upon the injunction bond into one of absolute character. The appeal was not from the order dismissing the bill for specific performance, because that dismissal was had at the instance of the complainants themselves. The appeal was not from the order dismissing the bill for injunction, because that dismissal was involved in the dismissal of the claim for specific performance and was likewise voluntary, as above shown. The appeal was from the order dismissing the bill for damages. With the character of the bill as one for damages the prayer for injunction was nowise related. There was no appeal from the order dismissing the injunction feature of the bill, and nothing in the controversy which was retained before the court which had the effect to
293 suspend liability upon the injunction bond. There is nothing in the case of Brown *et al. v.* The Galena Mining & Smelting Co. *et al.*, 32 Kan., 528, which militates against this view. In that case it was held that:

"In a suit brought for a perpetual injunction a right of action does not accrue on an undertaking given on the issue of a temporary injunction or restraining order until a final judgment in the suit in which it was issued is rendered; and a suit commenced on such undertaking, before such entry of judgment, is prematurely brought and cannot be maintained."

The sole purpose of the suit in that case was to obtain a perpetual injunction. The injunction asked for was not auxiliary to some other relief prayed for. It was therefore rightly held that a suit

upon the injunction bond would not lie merely because the temporary order had been vacated, because upon the final hearing a perpetual injunction might have been allowed, notwithstanding the vacation of the temporary order. The injunction bond in that, as in all other cases, was conditioned for the payment of damages "if it be finally decided that the injunction ought not to have been granted," and until final hearing it could not have been finally so decided. But in a proper sense it had been finally decided that the injunction order in the case of Wescott *et al. v.* Mulvane ought not to have been granted. The case is within the principle of Mitchell *v.* Sullivan *et al.*, 30 Kan., 231. In that case it was ruled:

"Where a plaintiff, on commencing a suit and obtaining a temporary injunction, gives an undertaking to secure to the party injured the damages he may sustain if it be finally decided that the injunction ought not to have been granted, and subsequently appears in court and dismisses the action without prejudice to a future action, and the court enters judgment dismissing the action, such judgment is equivalent to a final decision by the court that the plaintiff was not entitled to the temporary order of injunction, and after the judgment an action lies upon the injunction undertaking."

It is next contended that the contingency specified in the injunction bond, upon the occurrence of which the liability of the
294 sureties depended, never happened. The argument in support of this contention is that it never was finally decided that the injunction ought not to have been granted, but that without awaiting a decision upon the question the bill for injunction was voluntarily dismissed. There are two sufficient answers to this claim. First, a party cannot wrongfully sue out an injunction against his adversary and escape liability for the damages which consequently follow by voluntarily dismissing his action in anticipation of an adverse decision. In such case the order of dismissal made upon the complainants' application is an adjudication that the injunction ought not to have been granted. This point is expressly decided in Mitchell *v.* Sullivan *et al.*, *supra*; but an equally conclusive reply to the plaintiff in error in this respect is that in the case of Wescott *et al. v.* Mulvane it was finally decided that the injunction ought not to have been granted. Before the complainants voluntarily dismissed their bill for injunction a hearing was had as to the rightfulness of granting it in the first instance. Upon that hearing an order dissolving the injunction was made. While in chancery practice the rightfulness of all interlocutory orders come up for review again upon final hearing, yet unless reversed or otherwise changed upon the final hearing they become final decisions either as of the time when made or as of the time of review.

It is next contended that there was a failure to separate the attorneys' fees which Mulvane claimed he had paid in the injunction branch of the case from those paid for defending the bill for damages for non-performance of contract, and also that a portion of that for which he made claim was paid for services not rendered to him, but rendered to other defendants in the injunction proceeding. We

have examined the evidence as to this. The plaintiff in error
295 is mistaken. We have also examined the instructions of the court in respect to the apportionment of attorneys' fees between the several parties, and in respect of the separate contracts for attorneys' services in the case, and likewise have examined the requests for instructions upon those subjects made by plaintiff in error and find no error committed in the instructions given nor in refusing the requests for instructions. It is next contended that the court erred in admitting as evidence in the case the opinion of the circuit court of appeals—Wescott *et al. v.* Mulvane, *supra*. The principal ground upon which this contention is made is that the opinion of a court does not constitute a part of the record in the case, and in addition to this it is claimed that the résumé of facts contained in the opinion in question was in the nature of evidence upon controverted points, and was therefore hearsay in character. The opinion of a court does not ordinarily constitute a part of the record of the case, and is therefore inadmissible except for certain purposes. It is, however, admissible in all cases if necessary to explain or characterize the points at issue in a case and decided by the court. There are some few holdings to the contrary, but the general rule is as stated. This case is an instance of the propriety of using the opinion of a court for the purpose of an understanding of the judgment rendered by it. It was, of course, necessary for the plaintiff in the court below to prove that the injunction issued against him had been dissolved, and that a final decision had been made that such injunction ought not to have been granted. The best evidence of those facts was, of course, the record of the Federal courts trying the case. For the purpose of record evidence the mandate to the circuit court issued by the circuit court of appeals was introduced. That man-
296 date recited the fact of the proceeding in the circuit court, the appeal to the circuit court of appeals, and the hearing of the appeal in the last-named court. The mandate concluded in the two following paragraphs:

"In consideration whereof it is ordered, adjudged, and decreed by this court that the decree of the said circuit court in this cause be, and the same is hereby, affirmed with costs, and that Joab Mulvane recover against George P. Wescott and Samuel Hanson the sum of twenty dollars for his costs herein and have execution therefor, October 16th, 1893.

You therefore are hereby commanded that such proceedings be had in said cause as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding."

It will be observed that this mandate did not disclose the particulars or even the general nature of the decree of the circuit court which had been affirmed by the circuit court of appeals. To ascertain the decision of the first-named court, which had been affirmed by the one last named, it became necessary to resort to extrinsic evidence. It is true that the record of the circuit court was in evidence, and that such record showed that the bill of complainant had been dismissed, but the ground of the dismissal was not stated in that record with the particularity necessary to a complete under-

standing of the case, and to a full knowledge of the fact that it had been finally decided that the injunction ought not to have been granted, or necessary to a knowledge of the fact that in the judgment of the court the dismissal of the bill for specific performance carried with it a dismissal of the incident claim for injunction. Hence the opinion of the circuit court of appeals was proper if not necessary in explanation of the points in issue and of the thing finally adjudicated. The law is quite well settled that for purposes of such explanation the opinions of courts are receivable in evidence. Van Fleet's Former Adjudication, vol. 1, sec. 278. A trial court in giving effect to the mandate of the appellate tribunal should construe
297 the mandate in the light of the opinion of the reviewing court—Enc. of Plead. & Prac., vol. 13, 847—and for the same reason when necessary for any purpose to an understanding of the mandate or judgment of a court its accompanying opinion may be examined. Van Fleet's Former Adjudication, vol. 2, sec. 421.

But independently of the rule of the admissibility of the opinions of judges to identify the points decided and the judgments rendered, and assuming the non-existence of such rule, there was nothing in the opinion of the circuit court of appeals prejudicial to the defense of the defendant in the court below. The recitals of fact contained in it were not different from the facts proved upon the trial of the case, and the error, if it were to be called such, would therefore have to be regarded as unsubstantial and harmless.

It is next contended that a hypothetical question as to the value of the attorneys' services was based in part upon certain assumptions of fact, not facts given in evidence, and also that it contained a certain element not admissible to be stated in the question or considered by the jury. As to the first of these objections the plaintiff in error is mistaken. The hypothetical question in the particulars mentioned had a basis in the evidence. As to the other objection the plaintiff in error is also mistaken. The defendant Mulvane had testified that because of the nature of his business at and about the time of the making of the contract for the sale of the water-works stock, and in particular on account of obligations he had assumed in purchasing some of it from other stockholders, he would have been bankrupt had not the injunction prohibiting the completion of the sale to Coffin & Stanton and Woodbury & Moulton been dissolved. The importance of the litigation to him in view of this state of his business affairs was made an element of the hypothetical question asked. There is no error in this. The general rule is that the importance of a case
298 to the client and the benefits received by him through the successful termination of the litigation, as well as the general nature and character of such litigation and the questions of law and fact involved in it, may be considered in determining the value of the legal services performed and the compensation to which the attorney is entitled. In a general way this rule was remarked upon in Ottawa University *v.* Parkinson, 14 Kan., 160. In the case of Bentley *v.* Brown, 37 Kan., 14, it was said that it is the duty of the court in determining the value of legal services to take into consideration "the terms of employment, the character of the litigation

in which the services were performed, the time occupied, and the benefits resulting to the defendant from the services." In Selover *et al. v.* Bryant, 54 Minn., 434, an instruction to the jury that in arriving at the compensation justly payable for attorneys' services their value to the client should be taken into account was approved by the court. The point was disposed of in the following paragraph of the opinion:

"The only other assignments of error which we deem worthy of specific mention are those relating to the charge of the court that the value of the services (of the plaintiff) 'to Mrs. Bryant' should be considered by the jury. There was no error in this. The court did not say that that consideration alone should be taken as the measure of value. The value of the services of an attorney is necessarily to be determined by many considerations besides the mere time visibly employed in the conduct of a suit. Among other things the importance and results of the case are to be considered. The importance of the cause to the client affords to some extent a measure of the skill, care, responsibility, anxiety, and effort demanded of and to be born- by the attorney, and should not be disregarded in their bearing upon the question of the value of such services."

We take it that if the hypothetical question had merely stated that the litigation was of great pecuniary importance to Mulvane no objection worthy of consideration could or would have been made. If it would have been proper to state in general terms that the litigation was of great financial importance, no reason is perceived
299 why the particular facts showing its importance might not be stated.

The bond given by the plaintiff in error was conditioned to pay all damages which the defendant in error might sustain. This was not, of course, an obligation to pay damages remote, conjectural, or speculative in character, but only to pay such damages as were the actual, natural, and proximate result of the granting of the injunction order. High on Injunctions, 3 ed., sec. 1663. The natural and probable result of the issuance of the injunction order was the employment of attorneys to procure its dissolution and the payment to them of fees commensurate with the services performed. There was no way of apportioning the compensation charged by the attorneys for services performed without the element of exertion to save from impending bankruptcy or exertion to save because of it. Perhaps, if the injunction had continued for such length of time as to have resulted in Mulvane's bankruptcy, the plaintiff in error would not have been liable to him for the restoration of his fortune, because the bankruptcy of the defendant in an injunction proceeding is not the natural or ordinary result of the injunction order; but the natural and ordinary consequences of an injunction order *is* the payment of counsel fees commensurate, among other things, with the special importance of the case to the defendant and the special results accruing to him through the dissolution of the injunction order. The surety in such cases is required to know that the defendant in the injunction proceeding will put forth all necessary

efforts to save himself from all harmful consequences, and the obligation assumed by the surety is to reimburse the defendant for all expenses reasonably and necessarily incurred in averting such consequences.

Lastly, it is claimed that the damages awarded were ex-
300 cessive. This was entirely a question of fact for the jury. Evidence of attorneys of long experience, large practice, and high professional character was taken, and much of it fully supported the verdict rendered. The verdict, therefore, is conclusive upon us.

There is no error in the record, and the judgment of the court below is affirmed.

301 And afterwards, on the 18th day of April, 1900, there was filed in the office of the clerk of the supreme court of the State of Kansas a petition for a writ of error, which, with all the endorsements thereon, is in the words and figures as follows, to wit:

302 In the Supreme Court of the State of Kansas.

A. J. TULLOCK, Plaintiff in Error,)
vs
JOAB MULVANE, Defendant in Error.)

Petition for Writ of Error.

Comes now the said Andrew J. Tullock, plaintiff in error herein, and says that on the 7th day of April, A. D. 1900, this court entered judgment herein in favor of the defendant in error and against the plaintiff in error, in which judgment and in the proceedings had prior thereunto in this cause certain errors were committed to the prejudice of this plaintiff in error, and, as this plaintiff in error complains and says, against a right, privilege, and immunity claimed to exist by virtue of a clause of the Constitution of the United States and a statute of and commission held or an authority exercised under the United States, all of which will more fully and at length appear by the assignment of errors which is filed with this petition in error.

Wherefore this plaintiff in error prays that a writ of error may be allowed in this behalf to the Supreme Court of the United States for the correction of the errors complained of, and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the said Supreme Court of the United States.

ROSSINGTON, SMITH & HISTED,
Att'ys for Plaintiff in Error.

303 [Endorsed:] No. 11318. Kansas supreme court. A. J. Tullock, pl'tff in error, *vs.* Joab Mulvane, def't in error. Petition for writ of error. Filed Apr. 18, 1900. D. A. Valentine, clerk supreme court. Rossington, Smith & Histed, rooms No. 18, 20, 22, 23, and 24 Crawford building, Topeka, Kansas, attorneys for pl'tff in error.

304 And also, on the 18th day of April, 1900, before the Honorable Frank Doster, chief justice of the supreme court of the State of Kansas, at his chambers, in the city of Topeka, the following proceeding was had and entered of record as follows, to wit:

305 In the Supreme Court of the State of Kansas.

A. J. TULLOCK, Plaintiff in Error,
vs.
JOAB MULVANE, Defendant in Error.

Order Allowing Writ of Error.

Now comes the said Andrew J. Tullock, plaintiff in error in the above-entitled cause, by Rossington, Smith & Histed, his attorneys, and presents to the undersigned, chief justice of the supreme court of the State of Kansas, his petition herein praying for the allowance of a writ of error in the above-entitled cause to the Supreme Court of the United States for the correction of certain errors complained of and more fully set forth in the assignment of errors accompanying said application for writ of error.

Upon consideration whereof it is hereby ordered that the said petition be, and the same is hereby, granted and the said writ of error allowed.

The said plaintiff in error, having superseded the judgment of the court below by a good and sufficient bond, now on file in this court, presents his bond for costs on said writ of error in the sum of one thousand dollars, with American Surety Company as surety thereon.

306 In consideration whereof the said bond and the sufficiency of the sureties thereupon is hereby approved by me.

FRANK DOSTER,
Chief Justice of the Supreme Court of the State of Kansas.

(Indorsed on back:) No. 11318. Kansas supreme court. A. J. Tullock, pl'ff in error, *vs.* Joab Mulvane, def't in error. Order allowing writ of error and approval of bond. Filed April 18, 1900. D. A. Valentine, clerk supreme court. Rossington, Smith & Histed, attorneys for pl'ff in error.

307 And also, on the 18th day of April, 1900, there was filed with the petition for writ of error in the office of the clerk of the supreme court of the State of Kansas an assignment of errors in the above-entitled cause, which, with all the endorsements thereon, is in words and figures as follows, to wit:

308 In the Supreme Court of the State of Kansas.

A. J. TULLOCK, Plaintiff in Error,
vs.
JOAB MULVANE, Defendant in Error.

Assignment of Errors.

Comes now the said Andrew J. Tullock, plaintiff in error, and submits herein, in support of his petition for writ of error, his certain assignment of errors which he avers appears in the record of said cause in this court:

I.

The supreme court of the State of Kansas erred in affirming the judgment of the district court of Shawnee county.

II.

The supreme court of the State of Kansas erred in failing and refusing to reverse the judgment of the said district court.

III.

The supreme court of the State of Kansas erred in sustaining the judgment of the court below awarding to the defendant in error attorneys' fees as part of the damages recoverable in the action, and in sustaining the action of the court below in refusing to grant the instruction requested by said plaintiff in error that the said defendant in error was not entitled to recover anything in this action on account of attorneys' fees for the reason that the bond upon which said suit was brought was given in the circuit court of the United States and is governed as to the liability upon it by the law as established by the Supreme Court of the United States.

IV.

309 The said supreme court of the State of Kansas erred in not holding to be erroneous and reversing said cause therefor the ruling of the court below allowing proof of special damages when the same had not been properly pleaded and petitioned, and at the conclusion of the plaintiff's evidence, and after the demurrer to the evidence had been considered and overruled, in allowing the plaintiff to amend his petition by setting out attorneys' fees paid and claiming recovery therefor.

V.

The supreme court of the State of Kansas erred in failing to hold the action of the court below erroneous in overruling the plea and objection of the defendant to the effect that said action was prematurely brought.

VI.

The supreme court of the State of Kansas erred in refusing to hold as error the following instruction given by the court below, to wit:

"Where a suit is commenced and a temporary injunction granted and thereafter set aside, the party against whom the injunction is granted may recover upon the injunction bond given whatever actual damage he has sustained by reason of the wrongful issuance of the injunction, and the person against whom the injunction is granted may maintain an action upon the injunction bond for damages sustained at any time after the temporary injunction has been set aside or the injunction branch of the case abandoned by the plaintiff. He is not required to wait until the main action is terminated. In this case, then, if you find from the evidence that prior to the commencement of this suit a temporary injunction had been issued in the case in the Federal court and had been set aside or the injunction branch of the case abandoned by the plaintiff in the suit, then the defendant or defendants against whom the injunction had been issued could maintain an action to recover the damage sustained by reason of the wrongful issuance of the injunction."

VII.

The supreme court of the State of Kansas erred in not reversing the said cause and holding to be erroneous the refusal of the court below to give to the jury upon the request of the plaintiff in error the following special instruction:

"If you find from the evidence that the circuit court of
310 the United States had prior to the bringing of this suit entered a final judgment and decree in favor of the defendant Mulvane and against Wescott & Hanson, but that thereafter within the time allowed therefor the said Wescott & Hanson had prosecuted an appeal from said judgment and decree to the United States circuit court of appeals and had perfected their said appeal and said appeal was pending in said United States circuit court of appeals at the time of the bringing of this suit, then and in that event this action was prematurely brought, and your verdict must be for the defendant."

VIII.

The supreme court of the State of Kansas erred in not holding as error and reversing said cause the ruling of the court below in admitting, over the objection of said plaintiff in error, as evidence to sustain the allegation of plaintiff's petition that a final decision had been had, that said injunction had been unlawfully granted, the stipulation entered into on October 7th, 1890, and set out in said record, and in holding that such evidence was not a variance and departure from the provisions of said bond and the allegations of said defendant in error's petition or a breach thereof.

IX.

The supreme court of the State of Kansas further erred in not reversing said cause, with a judgment in favor of said plaintiff in error, it appearing from said record that said plaintiff in error had demanded judgment from the court below because the liability of the said Tullock was that of surety upon said bond, and the liability

which he had assumed upon said bond was a specific one and could not accrue by the acts of the parties in making the said stipulation and agreement, but was discharged thereby, and the court below should not have given effect to said stipulation and agreement of the parties as binding upon the said plaintiff in error as surety, inasmuch as the said stipulation was not a final decision of the rightfulness of granting such injunction, and that a final decision in respect thereto was by said stipulation and agreement, by the acts of the parties, without notice to or acquiescence by the said Tullock, made impossible.

311 X.

The supreme court of the State of Kansas erred in holding:

1st. That the plaintiff was entitled to recover anything in said action on account of attorneys' fees for services rendered in resisting the application of Wescott & Hanson for a temporary injunction, and, further, in failing to hold that if attorneys' fees could be allowed at all, they could only be for legal services rendered plaintiff in procuring a dissolution of the injunction, and to be strictly limited to such services.

XI.

The said supreme court erred in sustaining the contention of said defendant in error as to attorneys' fees, and by upholding the instructions and rulings of the court below against the exception of the defendant, because from the record herein it does not appear that there was any separation and apportionment of the gross fees charged and paid between those due for services rendered in procuring a dissolution of the injunction and those rendered generally in the case.

2nd. Because it does not appear that there was a separation and apportionment of the value of the services rendered by said attorneys on behalf of the Topeka Water Company, the Topeka Water Supply Company, and Coffin & Stanton from the services rendered to the said defendant in error, Joab Mulvane.

3rd. Because the said supreme court sustained the court below in permitting a recovery for a gross attorneys' charge for a stipulation and agreement said to have been made by Mulvane with the other defendants in the case, that he, Mulvane, would bear the entire charge of attorneys' fees and expenses for said parties, although no notice of such stipulation or agreement was brought to the attention of Wescott & Hanson, or the said plaintiff in error, or the at-
312 torneys for said Wescott & Hanson, prior to or subsequent to the filing of the stipulation dismissing said defendants from the cause wherein said defendants, in consideration of such stipulation, released all claims and damages whatsoever; and,

4th. Because the court permitted proof and charge for payment of more than one attorney fee to more than one attorney or firm of attorneys for such services in said cause.

XII.

The said supreme court erred in sustaining the ruling of the court below and failing to hold as error the permitting of the opinion of the United States circuit court of appeals in the cause of Wescott & Hanson *vs.* Mulvane *et al.* to be read to the jury as evidence.

XIII.

The said supreme court erred in failing to reverse said cause and not holding as error the ruling of the court below permitting the plaintiff's hypothetical question, which appears at large in said record and is too lengthy and voluminous to be herein set out, as to the value of the attorneys' services, to be asked the witnesses, because the same contains allegations of fact not sustained by the evidence, and, if sustained by the evidence, as involving an improper element in estimating and determining what services should be worth.

XIV.

The said supreme court of the State of Kansas erred in failing to hold to be erroneous the action of the court below in overruling the motion for a new trial.

ROSSINGTON, SMITH & HISTED,
Attorneys for Plaintiff in Error.

313 [Endorsed:] No. 11318. Kansas supreme court. A. J. Tullock, pl'ff in error, *vs.* Joab Mulvane, def't in error. Assignment of errors. Filed Apr. 18, 1900. D. A. Valentine, clerk supreme court. Rossington, Smith & Histed, rooms No. 18, 20, 22, 23, and 24 Crawford building, Topeka, Kansas, attorneys for pl'ff in error.

314 And also on the 18th day of April, 1900, there was filed in the office of the clerk of the supreme court of the State of Kansas an appeal bond in the above-entitled cause; which said bond, with all of the endorsements thereon, is in the words and figures as follows, to wit:

315 In the Supreme Court of the State of Kansas.

A. J. TULLOCK, Plaintiff in Error,
vs.
JOAB MULVANE, Defendant in Error.

Know all men by these presents that A. J. Tullock, as principal, and The American Surety Company of New York, as surety, are held and firmly bound unto the said Joab Mulvane, defendant in error, his heirs, executors, and administrators, in the sum of one thousand dollars, lawful money of the United States, the payment of which, well and truly to be made, we and each of us bind ourselves, jointly and severally, and our and each of our heirs, successors, executors, and administrators, firmly by these presents.

Signed and sealed by us this 18th day of April, A. D. 1900.

Whereas the above-bounden A. J. Tullock hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the supreme court of the State of Kansas:

Now, therefore, the condition of this obligation is such that if the — bounden A. J. Tullock shall prosecute his said writ of error to effect and answer all costs and damages if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

316 In witness whereof we have hereunto set our hands and the seal of the said American Surety Company of New York the day and date last above written.

[SEAL.] A. J. TULLOCK.
AMERICAN SURETY CO. OF N. Y.,
By P. I. BONEBRAKE, *Res. Vice-President.*

Attest: H. E. VALENTINE,
Res. Assistant Secretary.

[Revenue stamp, 5 cents, cancelled.]

(Indorsed on back:) No. 11318. Kansas supreme court. A. J. Tullock, pl'ff in error, *vs.* Joab Mulvane, def't in error. Bond. Filed April 18, 1900. D. A. Valentine, clerk supreme court. Rossington, Smith & Histed, attorneys for pl'ff in error.

317 And afterwards, on the 19th day of April, 1900, there was filed in the office of the clerk of the supreme court of the State of Kansas a writ of error in the above-entitled cause, the original of which is hereunto attached, and is in the words and figures as follows, to wit:

318 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Kansas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Kansas, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between A. J. Tullock, plaintiff in error, and Joab Mulvane, defendant in error, wherein there was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the right, title, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty,

statute, or commission, a manifest error has happened, to the great great damage of the said A. J. Tullock, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within thirty days from the date hereof, that, the record

319 and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 18th day of April, in the year of our Lord one thousand nine hundred.

[The Seal of the Circuit Court of the United States, District of Kansas.]

GEO. F. SHARITT,
Clerk of the United States Circuit Court
for the District of Kansas.

Allowed by—
FRANK DOSTER,
Chief Justice.

320 [Endorsed:] No. 11318. Kansas supreme court. A. J. Tullock, pl'tiff in error, *vs.* Joab Mulvane, def't in error. Writ of error. Filed April 9, 1900. D. A. Valentine, clerk supreme court. Rossington, Smith & Histed, rooms No. 18, 20, 22, 23, and 24, Crawford building, Topeka, Kansas, attorneys for pl'tiff in error

321 And also, on the 19th day of April, 1900, there was filed in the office of the clerk of the supreme court of the State of Kansas a citation, together with a- acknowledgement of service, the original of which, together with the endorsements thereon, is in the words and figures as follows, to wit:

322 UNITED STATES OF AMERICA:

To Joab Mulvane, of Topeka, Shawnee county, Kansas, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Kansas, wherein you are defendant in error and A. J. Tullock is plaintiff in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness Honorable Frank Doster, the chief justice of the supreme court of the State of Kansas, this 18th day of April, A. D. 1900.

FRANK DOSTER,
Chief Justice of the Supreme Court of the State of Kansas.

Service of this citation hereby acknowledged on the 18th day of April, A. D. 1900.

N. H. LOOMIS,
Att'y for Joab Mulvane.

323 [Endorsed:] No. 11318. Kansas supreme court. A. J. Tullock, pl'tff in error, *vs.* Joab Mulvane, def't in error. Citation. Filed Apr. 19, 1900. D. A. Valentine, clerk supreme court. Rossington, Smith & Histed, rooms No. 18, 20, 22, 23, and 24, Crawford building, Topeka, Kansas, attorneys for pl'tff in error.

324 In the Supreme Court of the State of Kansas.

I, D. A. Valentine, clerk of the supreme court of the State of Kansas, do hereby certify that the above and foregoing is a full, true, correct, and complete transcript of all pleadings and papers filed and of all proceedings had in said court in the above-entitled cause as the same remains on file and of record in my office.

Seal Supreme Court, State of Kansas.

Witness my hand and the seal of the supreme court of the State of Kansas affixed hereto, at my office, in the city of Topeka, this 28th day of April, A. D. 1900.

D. A. VALENTINE,
Clerk of the Supreme Court of the State of Kansas.

Endorsed on cover: File No., 17,750. Kansas supreme court. Term No., 275. A. J. Tullock, plaintiff in error, *vs.* Joab Mulvane. Filed May 10th, 1900.

No. 275. 59.

Brf. of Rossington & Smith for P.E.

Office Supreme Court U.S.
FILED
APR 6 1901
JAMES H. McKENNEY,
Clerk

Filed April 6, 1901.

In the Supreme Court

OF THE

UNITED STATES.

October Term, 1900.

A. J. Tullock, Plaintiff in Error,
vs.
Joab Mulvane, Defendant in Error.
} No. 275.

BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR.

W. H. ROSSINGTON,
CHAS. BLOOD SMITH,
CLIFFORD HISTED,
Attorneys for Plaintiff in Error.

Hall Litho. Co., Printers and Binders, Topeka. 1447

In the Supreme Court

OF THE

UNITED STATES.

October Term, 1900.

A. J. Tullock,	Plaintiff in Error,	No. 2[illegible]
vs.		
Joab Mulvane,	Defendant in Error.	

BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR.

This is a writ of error from this court to the Supreme Court of the State of Kansas, complaining generally of the error in the affirmance of a judgment rendered by the District Court of Shawnee County in the State of Kansas. The subject of the action was a bond given in the Circuit

Court of the United States for the District of Kansas in a suit in which George P. Wescott and Samuel Hanson were complainants and Joab Mulvane, The Topeka Water Company, The Topeka Water Supply Company, Coffin & Stanton, bankers of New York, and the Atlantic Trust Company, of New York, were defendants.

The suit in which the bond was given was for specific performance and for an injunction. This is the second trial and appeal in this suit upon the bond. In the first trial judgment was rendered in favor of the plaintiff Mulvane against the defendant Tullock for such damages as the court held the Federal court might have awarded under the circumstances of the case, but excluding an allowance for attorneys' fees. The defendant in error, Mulvane, appealed the case to the Supreme Court which reversed the decision of the court below in an opinion to be found in 58 Kan. 622.

The case was again retried and a claim asserted by defendant in error in the court below for about $25,000 of attorneys' fees, and other damages. This trial resulted in a judgment in favor of Mulvane and against Tullock for the sum of $25,000 of which approximately $20,000 was for attorneys' fees. Thereupon, the case was appealed to

the Supreme Court of the State of Kansas by Tullock and this last judgment of the court below affirmed.

See, 61 Kan. 650.

The plaintiff in error has assigned for the consideration of this court a number of errors, which he alleges the court committed in the affirmance of this judgment. The assignments of error are to be found upon page 291 and following pages of the printed record.

A brief statement of the controversy and the proceedings out of which this bond grew is essential to the understanding of the case.

Statement of the Case.

The record in the Circuit Court of Appeals for the Eighth Circuit of this original suit is incorporated within and made a part of the record here, and to that record we refer the court for any additional details to those contained in this statement which we shall endeavor to make sufficiently full for the purposes of compliance with the rule of this court and for an understanding of the exact controversy between the parties here.

Joab Mulvane was the president of The Topeka

Water Supply Company, a company organized for the purpose of supplying the city of Topeka and its inhabitants with water. Messrs. Wescott and Hanson visited the city of Topeka on behalf of themselves and others for the purpose of inspecting the property and books of the Water Supply Company with a view of purchasing the entirety of its stock. Certain negotiations were entered upon and a certain offer was made in Topeka to Mulvane for such stock. Correspondence followed between the parties and on December 4, 1889, Mulvane wrote to Wescott that he would meet him in Boston on the 14th of December, and said: "I shall be able to talk and act definitely with you as to the business matter heretofore discussed."

The parties met in Boston on the 14th and entered into a contract in writing, as follows (see printed record, p. 27):

"BOSTON, December 14, 1889.

Gentlemen:

I will sell you the entire capital stock of The Topeka Water Supply Company, of Topeka, Kansas, which consists of 4,000 shares of par value of $100 per share, for the sum of five hundred thousand dollars ($500,000), on the following terms of payment, viz.: The sum of sixty thousand dollars ($60,000) to be paid in cash on the signing

of a contract to be made and entered into as of this date, the consideration named in said contract to be four hundred and forty thousand dollars ($440,000), to be paid as follows: The sum of two hundred thousand dollars ($200,000) to be paid February 10th, 1890, one hundred and forty thousand dollars ($140,000) to be paid February 20th, 1890, and one hundred thousand dollars ($100,000) to be paid March 20th, 1890, provided, that final payment of the last named sum of one hundred thousand dollars may be paid on February 20th, if said Wescott and Hanson may elect so to do, by giving me five days' notice of such intention.

Payments to be made for and delivery of said stock to be made at the National Bank of North America, in the city of Boston, Mass.

JOAB MULVANE.

To Geo. P. Wescott, Samuel Hanson.

We hereby accept your offer to sell the entire capital stock of The Topeka Water Supply Company for the price and on the terms and conditions above stated.

GEO. P. WESCOTT,
SAMUEL HANSON."

Differences arose between Wescott and Hanson and Mulvane, as to the construction of the contract, and thereupon Mulvane went to New York and the day following sold the stock to Messrs. Coffin & Stanton for $550,000. Subsequently, as appears from the record, Wescott and Hanson learned of this sale by seeing a circular in

which Coffin & Stanton were proposing to reorganize this company and to issue a large amount of bonds thereon. In the meantime, and after the sale of the property to Coffin & Stanton, The Topeka Water Company was formed. An ordinance was secured from the city of Topeka authorizing the transfer of the property from The Topeka Water Supply Company to The Topeka Water Company, and The Topeka Water Company had executed and was about to negotiate and deliver to Coffin & Stanton the bonds in question. Thereupon suit was brought by Wescott and Hanson, in the United States Circuit Court for the District of Kansas, against Mulvane to compel him to perform his contract with the complainants and to enjoin him (Mulvane), The Topeka Water Company, The Topeka Water Supply Company and Coffin & Stanton from carrying out the proposed reorganization and transfer of bonds and stock of The Topeka Water Company.

The bill was filed on February 5, 1890, and on the same day Judge Foster granted a restraining order against all the parties as prayed for in the bill. On February 13th the application for the temporary injunction was heard and a temporary

injunction was allowed, a bond for $75,000 being exacted by the order to be filed on the 15th day of February, 1890 (Record, p. 123).

On the 15th of February, at the date when the bond was to be filed, the court made an order permitting the complainants to substitute a cash deposit of $75,000 for the bond. (See page 124 of the record.) The temporary injunction had been allowed upon full hearing and upon affidavits of all the parties introduced and filed.

After the temporary injunction had been allowed and before the motion to dissolve, appearances were entered for all of the defendants and answers were filed for Joab Mulvane and The Topeka Water Supply Company and a plea of The Topeka Water Company; and an application was made by Woodbury & Moulton to be made parties to the suit, which application was, by Judge Foster, denied (pp. 125, 129, 136, 144, 146, 151).

Subsequent to the order granting the temporary injunction notice was served upon the complainants of a motion to dissolve to be heard before Judge Caldwell, newly appointed United States Circuit Judge, at Little Rock, Arkansas. On April 4, 1890, hearing was had upon the applica-

tion of Coffin & Stanton, and an order dissolving the temporary injunction was made, which appears on page 164 of the record, and which is as follows:

"And now come said complainants by Rossington, Smith & Dallas, their solicitors, and also comes Joab Mulvane, The Topeka Water Supply Company and The Topeka Water Co., by A. L. Williams, J. D. McFarland, Eugene Hagan and A. A. Hurd, their attorneys, and also come Coffin & Stanton by Silas B. Jones and J. D. McFarland, their attorneys, and the motion of Coffin & Stanton to dissolve the temporary injunction issued in this cause came on for hearing, and it appearing that an indispensable party defendant to this suit is not made a defendant, and cannot be made a defendant without ousting the jurisdiction of the court, the said indispensable party defendant and the plaintiffs being citizens of the same state, and it further appearing that the court granting the temporary injunction postponed the consideration and decision of this question until the coming in of the pleadings and proofs now before me on that subject:

It is therefore ordered, considered and adjudged that the temporary injunction granted in this cause by the Circuit Court on the 13th day of February, 1890, be and the same is hereby dissolved.

April 4, 1890.

HENRY C. CALDWELL,

Circuit Judge of Eighth Circuit."

Thereupon, replication was filed to the answer of The Topeka Water Supply Company, and exceptions to the answer of Coffin & Stanton for

impertinence and the plea of The Topeka Water Company was set down for hearing. It appearing by all of the affidavits that the Atlantic Trust Company was not a necessary party to the suit, it was dismissed from the bill on the 10th of April, 1890. To the end of bringing the cause to hearing upon its merits, various stipulations and agreements were made between the parties, as is shown by the record, all of the attorneys who appeared in resistance of the application for temporary injunction, as well as all the attorneys who appeared upon the motion to dissolve, appearing as attorneys and signing these various pleadings and stipulations (p. 165, *et seq.*).

On the 2d day of June, 1890, the court permitted to be submitted for the $75,000 deposit a bond upon which George P. Wescott and Samuel Hanson appeared as principals and A. J. Tullock and W. M. D. Lee, of Leavenworth, Kansas, as sureties (p. 171). The bond will be found at page 168 of the record. Subsequent to the giving of this bond, replications were filed, stipulations were entered into and the plea of The Topeka Water Company was argued and sustained, the same attorneys appearing in all of these matters (pp. 171, 172, 173).

On the 7th day of October, 1890, the same counsel who appeared throughout, namely, A. L. Williams and J. D. McFarland, as solicitors for defendant Joab Mulvane and the two water companies, entered into certain stipulations with the complainants which appear at large upon pages 174 and 176 of the record.

By stipulation with Mulvane it was agreed that the case should be continued until the June, 1891, term, and fixing the time for the taking of testimony and apportioning the same and stipulating further that the case should be submitted and heard before the full bench of the court, meaning, we presume, that one of the circuit judges should sit with the district judge. The other stipulation, which is one of the most significant features of this case, is one between the complainants and Coffin & Stanton, The Topeka Water Company and The Topeka Water Supply Company, which for the convenience of the court is here set out in full:

"It is hereby stipulated in the above entitled cause, between the complainants and defendants, Coffin & Stanton, and The Topeka Water Supply Company and The Topeka Water Company, as follows:

1. The complainants hereby dismiss their bill as to the above named defendants, Coffin & Stan-

tion, The Topeka Water Supply Company, The Topeka Water Company, and discharge said defendants and each of them from all liability to complainants by reason of any of the matters alleged or prayed for in the bill of complaint in this cause.

2. Complainants hereby withdraw so much of their bill as seeks a specific performance of the alleged contract between complainants and Joab Mulvane described in said bill of complaint.

3. In consideration of the above, the said defendants, Coffin & Stanton, The Topeka Water Supply Company and The Topeka Water Company, and each of them, hereby waive, release and relinquish any and all rights of action they, or any of them, may have, if any, against the plaintiffs on the injunction bond given herein or otherwise, by reason of the complainants having sued out a temporary injunction in this cause.

4. Nothing contained in this stipulation shall be construed in any way as an admission that complainants' bill was improperly brought for specific performance.

5. Nothing contained in this stipulation shall enlarge or lessen, or in any manner affect the rights or remedies of complainants against Joab Mulvane in this suit or in any other action, except as contained in paragraph 2 hereof; nor shall anything contained herein enlarge or lessen, or in any manner whatever affect the rights or remedies of Joab Mulvane against complainants in this or any other action.

ROSSINGTON, SMITH & DALLAS,
Solicitors for Complainants.

COFFIN & STANTON,
By Silas B. Jones, their Solicitor.
A. L. WILLIAMS,
J. D. MCFARLAND,
Solicitors for The Topeka Water Supply Company and The Topeka Water Company, Defendants."

On the 28th day of November, 1890, an order was made by the Circuit Court in which the stipulation was embodied, dismissing the bill as to The Topeka Water Supply Company, The Topeka Water Company and Coffin & Stanton, as the court says: "Under the terms of and in pursuance of the provisions of said stipulation." This appears upon pages 176, 177 of the record.

And thereupon an order was made carrying into effect the stipulation with reference to the taking of testimony and the hearing of the cause, such order being entered coincident with and as part of the general arrangement on November 28, 1890, such order appearing upon pages 177, 178 of the record.

And thereupon, proof was taken in the case and the same was heard before the Hon. John A. Riner, United States District Judge, who decided the cause in favor of Mulvane and against the complainants. This decree appears upon page 240 of the record and is dated September 26, 1892, and concludes as follows:

"Now, therefore, on consideration thereof, it is ordered, adjudged and decreed that the said complainants' bill of complaint be and the same is hereby dismissed, with costs to the said defendant, Joab Mulvane, to be taxed.

Thereupon, said complainants pray an appeal to the Circuit Court of Appeals, which is allowed.

Thereupon, upon application of said complainants, supersedeas bond is fixed at the sum of $1,000 and appeal allowed.

JOHN A. RINER, *Judge.*"

On page 260 of the record the following stipulation appears, made at the trial of this case in the district court:

"It is now admitted in open court, by and between the parties to this action, that within the time allowed as shown by the printed record which has been introduced, complainants Wescott and Hanson prosecuted an appeal from the decision of the United States Circuit Court to the United States Circuit Court of Appeals, and gave the bond that is required in the order, and otherwise perfected their appeal, and that the case was pending on appeal in the United States Circuit Court of Appeals at the time of the commencement of this suit on the injunction bond, and remained pending there for some time after, when it was decided."

One of the assignments of error made by the complainant upon that appeal was as follows (p. 241):

"1. The court erred in dissolving the temporary injunction theretofore granted against the defendant Joab Mulvane."

It is shown that the entire record in the cause of *Wescott and Hanson vs. Mulvane* was taken

to the United States Circuit Court of Appeals upon said appeal.

This suit on the injunction bond was in fact brought on the 5th day of November, 1892. About a year after the commencement of this suit the Circuit Court of Appeals affirmed the decree of the United States Circuit Court, the mandate being filed on December 18, 1893.

The petition of the plaintiff in the present suit made as parties defendant A. J. Tullock and W. M. D. Lee, the sureties upon the bond. The principals, Wescott and Hanson, were not mentioned as parties. Service was had upon Tullock alone and the cause proceeded solely against him. The petition as originally filed was in the ordinary form of a declaration for breach of a bond and the allegation of the breach and the accruing of the defendant's liability is stated as follows (p. 8):

"Plaintiff further alleges that such further proceedings were had in the said suit pending in the Circuit Court of the United States for the District of Kansas, that it was finally decided that the said temporary injunction was unlawfully issued, and that the said complainants were not entitled to the said injunction."

Among other defenses, was one that the action had been prematurely brought.

In the course of the trial, after the plaintiff had

closed his case, a demurrer was interposed to the evidence and was argued and overruled, and thereupon the plaintiff asked leave to amend his petition to conform to the proof which had been given in the case. The plaintiff, in the presentation of his case, offered testimony tending to prove special damages in the way of attorneys' fees, which were not mentioned nor included within the terms of his petition; to which timely objections were made upon the ground of irrelevancy, and as being special damages not pleaded, and an additional ground that the obligation being a bond of the United States Circuit Court no such damages could be allowed. The amendment to his petition proposed was one of specific allegations in this regard and supplying the deficiency of his petition in that behalf (p. 246). The defendant objected to the allowance of such amendment at that time, and his objection was overruled. The case was tried to a jury and verdict was rendered in favor of the plaintiff in the sum of $25,000. Subsequently a motion for new trial was filed in due time, presenting substantially all of the errors which we shall complain of in this brief, and was taken under advisement by the court and subsequently overruled.

Thereupon an appeal was taken to the Supreme Court and the questions fully presented upon a brief and upon specifications of error fully as complete and substantially identical with the specifications, brief and argument which we now present here to this court.

The theory upon which the District Court of Shawnee County determined the questions presented to it, as well as the theory adopted by the Supreme Court upon the argument before that tribunal, was that the bond in question was like a common law contract; was to be governed by the laws of the forum, and that no consideration was to be given to the fact that the bond originated in and was executed pursuant to an order of the Circuit Court of the United States and in a case then pending before the Federal court; or that the laws and rules governing liability upon injunction bonds in the Federal court are different from the laws and rules governing bonds in the State court on common law undertakings.

Specifications of Error.

I.

The Supreme Court of the State of Kansas erred in affirming the judgment of the district court of Shawnee County.

II.

The Supreme Court of the State of Kansas erred in failing and refusing to reverse the judgment of the said district court.

III.

The Supreme Court of the State of Kansas erred in sustaining the judgment of the court below awarding to the defendant in error attorneys' fees as part of the damages recoverable in the action, and in sustaining the action of the court below in refusing to grant the instruction requested by said plaintiff in error that the said defendant in error was not entitled to recover anything in this action on account of attorneys' fees for the reason that the bond upon which said suit was brought was given in the Circuit Court of the

United States and is governed as to the liability upon it by the law as established by the Supreme Court of the United States.

IV.

The Supreme Court of the State of Kansas erred in holding:

1. That the plaintiff was entitled to recover anything in said action on account of attorneys' fees for services rendered in resisting the application of Wescott and Hanson for a temporary injunction, and, further, in failing to hold that if attorneys' fees could be allowed at all, they could only be for legal services rendered plaintiff in procuring a dissolution of the injunction, and to be strictly limited to such services.

V.

The said Supreme Court erred in sustaining the contention of said defendant in error as to attorneys' fees, and upholding the instructions and rulings of the court below against the exception of the defendant, because from the record herein it does not appear that there was any separation and apportionment of the gross fees charged and

paid between those due for services rendered in procuring a dissolution of the injunction and those rendered generally in the case.

2. Because it does not appear that there was a separation and apportionment of the value of the services rendered by said attorneys on behalf of The Topeka Water Company, The Topeka Water Supply Company and Collin & Stanton from the services rendered to the said defendant in error, Joab Mulvane.

3. Because the said Supreme Court sustained the court below in permitting a recovery for a gross attorneys' charge by reason of stipulation and agreement said to have been made by Mulvane with the other defendants in the case, that he (Mulvane) would bear the entire charge of attorneys' fees and expenses for said parties, although no notice of such stipulation or agreement was brought to the attention of Wescott and Hanson or the said plaintiff in error, or the attorneys for said Wescott & Hanson, prior to or subsequent to the filing of the stipulation dismissing said defendants from the cause wherein said defendants, in consideration of such stipulation, released all claims and damages whatsoever; and

4. Because the court permitted proof and

charge for payment of more than one attorney fee to more than one attorney or firm of attorneys for such services in said cause.

VI.

The Supreme Court of the State of Kansas erred in not holding as error the ruling of the court below in admitting, over the objection of said plaintiff in error, as evidence to sustain the allegation of plaintiff's petition that a final decision had been had that said injunction had been unlawfully granted, the stipulation entered into on October 7, 1890, and set out in said record, and in holding that such evidence was not at variance and departure from the provisions of said bond and the allegations of said defendant in error's petition or a breach thereof.

VII.

The Supreme Court of the State of Kansas further erred in not reversing said cause, with a judgment in favor of said plaintiff in error, it appearing from said record that said plaintiff in error had demanded judgment from the court below because the liability of the said Tullock

was that of surety upon said bond, and the liability which he had assumed upon said bond was a specific one and could not accrue by the acts of the parties in making the said stipulation and agreement, but was discharged thereby, and the court below should not have given effect to said stipulation and agreement of the parties as binding upon the said plaintiff in error as surety, inasmuch as the said stipulation was not a final decision of the rightfulness of granting such injunction, and a final decision in respect thereto was by said stipulation and agreement, by the acts of the parties, without notice to or acquiescence by the said Tullock, made impossible.

VIII.

The Supreme Court of the State of Kansas erred in failing to hold the action of the court below erroneous in overruling the plea and objection of the defendant to the effect that said action was prematurely brought.

IX.

The Supreme Court of the State of Kansas

erred in refusing to hold as error the following instruction given by the court below, to wit:

"Where a suit is commenced and a temporary injunction granted and thereafter set aside, the party against whom the injunction is granted may recover upon the injunction bond given whatever actual damage he has sustained by reason of the wrongful issuance of the injunction, and the person against whom the injunction is granted may maintain an action upon the injunction bond for damages sustained at any time after the temporary injunction has been set aside or the injunction branch of the case abandoned by the plaintiff. He is not required to wait until the main action is terminated. In this case, then, if you find from the evidence that prior to the commencement of this suit a temporary injunction had been issued in the case in the Federal court and had been set aside or the injunction branch of the case abandoned by the plaintiff in the suit, then the defendant or defendants against whom the injunction had been issued could maintain an action to recover the damage sustained by reason of the wrongful issuance of the injunction."

X.

The Supreme Court of the State of Kansas erred in not reversing the said cause and holding to be erroneous the refusal of the court below to give to the jury upon the request of the plaintiff in error the following special instruction:

"If you find from the evidence that the Circuit Court of the United States had prior to the bring-

ing of this suit entered a final judgment and decree in favor of the defendant Mulvane and against Wescott and Hanson, but that thereafter within the time allowed therefor the said Wescott and Hanson had prosecuted an appeal from said judgment and decree to the United States Circuit Court of Appeals and had perfected their said appeal and said appeal was pending in said United States Circuit Court of Appeals at the time of the bringing of this suit, then and in that event this action was prematurely brought and your verdict must be for the defendant."

XI.

The said Supreme Court of the State of Kansas erred in failing to hold to be erroneous the action of the court below in overruling the motion for a new trial.

Cases and Points.

I.

The case at bar, being upon an injunction bond given under order of the United States Circuit Court for Kansas in an equity case pending before said court, is as to all of its elements a case involving Federal questions, finally cognizable and determinable in this court.

Bein vs. Heath, 12 How. 168.

Russell vs. Farley, 105 U. S. 433.

Meyers vs. Block, 120 U. S. 206.

Arnold vs. Frost, Fed. Case No. 558.

Seymour vs. Phillips & Colby Const. Co., Fed. Case No. 12,689.

Leslie vs. Brown, 32 C. C. A. 556; 90 Fed. 171.

Tyler Min. Co. vs. Last Chance Min. Co., 32 C. C. A. 498; 90 Fed. 15.

Walker vs. Windsor Nat'l Bank, 5 C. C. A. 421; 56 Fed. 76.

Coosaw Mining Co. vs. Farmers Mining Co., 51 Fed. 107.

Lea vs. Daekin, 13 Fed. 541.

Lehman vs. McQuown, 31 Fed. 138.

Crane vs. Buckley, 105 Fed. 401.

2d Beach Modern Equity Pr., sec. 770, and cases cited.

II.

Inasmuch as this suit was subject to writ of error from the Supreme Court of the United States, it was the duty of the State Supreme Court to adopt, follow and enforce the rules and decisions of this court upon the questions therein involved.

Belcher vs. Chambers, 53 Cal. 635.

San Benito Co. vs. So. Pac. R. R. Co., 77 Cal. 518.

III.

The power to impose a bond as a condition for the injunction carried with it the power to relieve or mitigate the liability thereunder in the exercise of a sound discretion by the Federal court.

Russell vs. Farley, 105 U. S. 442.

Leslie vs. Brown, 32 C. C. A. 556; 90 Fed. 171.

Tyler Min. Co. vs. Last Chance Min. Co., 32 C. C. A. 498; 90 Fed. 15.

For the foregoing reason, the fundamental error of the State Supreme Court consisted in construing the bond as an independent contract, subject exclusively to forensic rules of decision.

IV.

Counsel fees are not recoverable as an element of damage for breach of injunction bonds exacted by Federal courts.

Arcambel vs. Wiseman, 3 Dallas 306.

Bein vs. Heath, 12 How. 168.

Oelrichs vs. Spain, 15 Wall. 230.

Browning vs. Porter, 12 Fed. 460.

The Alice, 12 Fed. 502.

Jacobus vs. Monon. Bank, 35 Fed. 396.

Fidelity Ins. Co. vs. Roanoke Iron Co., 91 Fed. 21.

That this is the rule of the Federal court has been recognized in numerous State decisions.

Oliphant vs. Mansfield, 36 Ark. 195.

Dorris vs. Miller, 105 Iowa 569; 75 N. W. 483.

Thurston vs. Haskell, 81 Me. 306; 17 Atl. 74.

Wood vs. State, 66 Md. 68; 5 Atl. 479.

Frost vs. Jordan, 37 Minn. 546; 36 N. W. 714.

Hill vs. Thomas, 19 S. C. 236.

Loeb vs. Mann, 39 S. C. 470; 18 S. E. 2.

Stringfield vs. Hirsch, 94 Tenn. 432; 29 S. W. 611.

Galveston, etc., R. R. Co. vs. Ware, 74 Tex. 50; 11 S. W. 920.

Jones vs. Rosedale, 75 Tex. 383; 12 S. W. 998.

V.

This suit was brought against a surety alone in the State court. His liability is to be strictly construed and he is presumed to have obligated himself with reference to the rule of damages established by the Federal court which in this behalf is paramount. The Kansas Supreme Court accordingly committed reversible error in allowing counsel fees as an element of recovery in this case.

VI.

It appears from the record that both the trial and the Supreme Courts of Kansas held that the

injunction proceeding was either abandoned or dismissed by virtue of the stipulation (appearing upon page 175 of the record) of October 7, 1890, and which is set forth in the opening statement of the case.

Our contention is that if this stipulation had this effect, then it extinguished Tullock's liability upon the bond, for the reasons following:

(*a*) Because it precluded and prevented such final determination or decision of the rightfulness of awarding the injunction as was contemplated and provided in the bond itself.

(*b*) Because the stipulation was itself a waiver of damages upon the bond by certain parties defendant to the suit in consideration of their dismissal from the suit, and in consideration of changing the suit from one of specific performance to one for damages.

(*c*) And it appearing as an undisputed fact in the record that these parties were the same as Mulvane and that the counsel making the stipulation represented him in representing and appearing for such parties, then the agreement to waive

damages was binding upon Mulvane for all purposes, and as Mulvane directly reaped the benefit of such stipulation, he cannot maintain a proceeding against the surety.

(*d*) It further appears from the record and is admitted that such stipulation was made without the knowledge or consent of the surety and after he had executed the bond.

(*e*) By the voluntary act of the parties the condition upon which the liability depended, namely, a final decision that the injunction ought not to have been granted, was rendered impossible, and except upon such condition no liability could attach to the surety.

Palmer vs. Foley, 71 N. Y. 106.

Johnson vs. Elwood, 82 N. Y. 362.

Tyler Min. Co. vs. Last Chance Min. Co., 32 C. C. A. 498; 90 Fed. 15.

Large vs. Steer, 21 Pa. St. 30; 15 Atl. 490.

High on Inj., 3d ed., 2d vol., secs. 1638, 1639, 1640 and 1641.

Beach on Inj., sec. 227.

Apollinaris Co. vs. Venable, 136 N. Y. 46.

Col. H. V. & T. Rwy. Co. vs. Burke, 54 O. St. 98; 43 N. E. 282.

Cassem vs. Ernst, 84 Ill. App. 70.

VII.

The petition in the State court upon this bond alleged a breach of the bond corresponding to its terms, namely, that it was "finally decided that said temporary injunction was unlawfully issued."

In proof of such breach the stipulation of October 7, 1890, was permitted to be introduced as evidence, against the objection of Tullock, and error predicated upon the same to the State Supreme Court. This stipulation and the opinion of the Circuit Court of Appeals, also introduced over the objection of defendant, was the sole testimony tending to prove the abandonment or dismissal of the injunction branch of the case. The Supreme Court of the State erred in not reversing the cause for this error for two reasons: First, because, as to the stipulation it was a fatal variance between the pleading and the proof. And second, the decision of the Circuit Court of Appeals was ren-

dered more than a year after the institution of the action upon the injunction bond and was no part of the record in the case.

England vs. Gephart, 112 U. S. 502, and cases therein cited.

Also, 20 Am. & Eng. Enc. of Law, 489, and cases there cited.

VIII.

The vice in the admission of this opinion in evidence further appears that without it no proof could have been otherwise adduced as to the effect or result legally of the stipulation of October 7, 1890, and the action on the bond might have been tried and determined before the opinion had been delivered; in fact was so tried the first time.

IX.

The action on the bond was prematurely brought because:

(*a*) The equity proceeding in which the bond was given was then pending upon appeal in the United States Circuit Court of Appeals. The order

dissolving the temporary injunction was assigned as one of the errors to be reviewed upon such appeal by the United States Circuit Court of Appeals.

(*b*) Because it could not be known that the effect of the stipulation was to preclude a review until that question had been finally decided by the United States Circuit Court of Appeals.

(*c*) That the bill having been retained by consent of parties with the understanding that the case should be tried and damages assessed by the court in lieu of a decree for specific performance, and an appeal having been taken from the decision of the court in such retained cause, Mulvane was in no position pending such appeal to bring a counteraction for damages against complainants.

(*d*) That under no aspect of this case can it be rightfully contended that the case was so finally determined and decided that an action accrued upon the bond until the mandate from the Court of Appeals had been filed in the United States Circuit Court.

As to the effect of appeal in equity cases, see:

Sibbald vs. U. S., 12 Pet. 488, 490.
Stewart vs. Salamon, 97 U. S. 361.
Southard vs. Russell, 16 How. 547.
Durant vs. Essex, 101 U. S. 555.
Kingsbury vs. Essex, 134 U. S. 650.
Smelting Co. vs. Billings, 150 U. S. 31.
Gaines vs. Rugg, 148 U. S. 228.
The Bissell Carpet Sweeper Co. vs. Goshen Carpet Sweeper Co., 19 C. C. A. 25, Sixth Circuit.
Metcalf vs. City of Watertown, 16 C. C. A. 37, Seventh Circuit.

That no action accrues on the bonds pending appeal, see:

Cohn vs. Lehman, 93 Mo. 574.
Hamilton vs. State, 32 Md. 348.
Howard vs. Park, 59 How. Pr. 344.
Musgrave vs. Sherwood, 76 N. Y. 194.
Gray vs. Veirs, 33 Md. 159.
Penny vs. Holberg, 53 Miss. 567.
Murfree on Official Bonds, sec. 391.
High on Inj., sec. 1648, *et seq.*

And that until the appeal from the decree of the court on the question of damages was determined, no action accrued, see:

Thompson vs. McNair, 64 N. C. 448.
Cohn vs. Lehman, 93 Mo. 574.

Argument.

I.

The Suit, and Every Incident of It, being upon a Federal Injunction Bond, Involved Federal Questions Finally Referable to this Court upon a Writ of Error.

The fundamental error committed by the Supreme Court of the State of Kansas and by the inferior Kansas court, whose decision it affirmed, is in asserting that the bond in question, which was an injunction bond exacted by a Judge of the United States Circuit Court in a cause depending in said court and of which it had exclusive jurisdiction and cognizance, was a contract not to be determined or governed by the laws and rules and decisions of the United States in that behalf, but was to be determined as an independent contract, by the laws, rules, decisions and judgments of the local forum in which an action upon such bond might be brought. This appears in the case of *Mulvane vs. Tullock*, which was the first appeal taken in the suit upon this bond, wherein the decision of the court below

was reversed. See 58 Kan. 632. We quote from the opinion of the court:

"The bond executed is in the ordinary form; is in the nature of a contract, and the liability of the obligors depends, not on the Federal Constitution or a congressional act, but on the proper interpretation of the bond itself. In the absence of a statute fixing the measure of damages or limiting the recovery, we think the bond should be viewed in the light of an independent contract, and is to be interpreted by the general principles of the common law. It is not a mere incident of the injunction proceeding, nor can this, which is an ordinary action at law, be regarded as auxiliary to the proceeding in the Federal court. Being an independent contract, actionable in any State court where service upon the sureties can be obtained, the interpretation of the forum applies. As the action on the bond could be brought in the State court—and, indeed, the present action could not have been brought in any other—it cannot be said that the sureties contracted with reference to the view of the law taken by the Federal courts. They knew that the obligation was enforceable in the courts of the State of which the plaintiff and defendants were all residents, and that the highest court of that State had consistently held that counsel fees were recoverable upon an injunction bond."

Our contention is that the bond is a mere incident of the injunction suit; that the court exacting the bond could in the suit itself by a summary proceeding cause damages to be assessed upon the bond, or could leave the party to his action at

law upon the bond, and that such action could be instituted in the Federal court in the first instance and, if instituted in the State court, the case would be removable into the Federal court; or, if allowed to remain in the State court, the State court would occupy the position of an assessor of damages, or a master, and be governed in its determination by the rules and decisions of the Supreme Court of the United States in that behalf. But it follows that in whatever forum the bond is enforced the rule of damages must be the same. To hold otherwise would involve a manifest absurdity and accomplish a manifest injustice. For example, this case might have been removed, as we shall presently show, into the Federal court, irrespective of the citizenship of parties, because a Federal question was involved. It would be absurd, as well as grossly unjust, to say that the surety should be bound by one rule of damages in the Federal court if he should remove and suffer a large additional loss as a penalty if he failed to remove.

The language of the Supreme Court in giving significance to the mere absence of a Federal statute governing liability of sureties on injunction bonds is unwarranted and betrays an entire mis-

conception of the element of Federal jurisdiction in this behalf. The right of the surety to have his liability measured by the Federal rules depends neither upon the presence nor the absence of a statute, but upon the fact that his obligation was an incident of the chancery jurisdiction of the Federal court, and therefore inevitably governed as to every aspect and element of such liability by the rules and decisions of the Supreme Court of the United States in chancery.

No case is cited to support the view of the State Supreme Court and none can be found. That all matters relating to the enforcement of this bond are of Federal cognizance is made manifest in a multitude of decisions, among which are the following:

Bein vs. Heath, 12 How. 168.

Russell, vs. Farley, 105 U. S. 433.

Meyers vs. Block, 120 U. S. 206.

In *Arnold vs. Frost*, Fed. Case No. 558, the court held:

"On an appeal to the Circuit Court from a final decree in a suit in equity in this court, the defendant F executed a bond, with three sureties, to three obligees, who were the plaintiffs in said suit, conditioned 'that if the above named appellant shall prosecute said appeal with effect, and pay all damages and costs which shall be awarded against

him as such appellant therein, if he shall fail to make said appeal good,' the bond should be void. After the affirmance of the decree by the Circuit Court, two of the three obligees brought a suit on it in this court against the obligors, to recover on it: *Held*, that this court had jurisdiction of the suit."

In that case, Judge Blatchford, who was on the district bench, said:

"This court has jurisdiction of this suit. It is not an original suit, but is an offshoot or outbranch of the suit in which the bond was given, and jurisdiction of that suit gives jurisdiction of the subject-matter of this suit, the defendants having been duly served with process in this suit. *Jones vs. Andrews*, 10 Wall. (77 U. S.) 327; *Christmas vs. Russell*, 14 Wall. (81 U. S.) 69; *Bobyshall vs. Oppenheimer*, Case No. 1,592; *Hatch vs. Dorr*, Id. 6,206; *Gwin vs. Breedlove*, 2 How. (43 U. S.) 29; *Dunne vs. Clark*, 8 Pet. (33 U. S.) 1."

In *Leslie vs. Brown*, 32 C. C. A. 556; 90 Fed. 171, the United States Circuit Court of Appeals for the Sixth Circuit, decided:

"The court which grants an injunction, and takes an injunction bond to save the defendant from loss caused thereby, may, in an ancillary proceeding, summarily enforce such bond against the sureties.

A Federal court has jurisdiction of an action at law brought on an injunction bond taken by such court as one to enforce a right secured to the plaintiff by the constitution and laws of the United States and arising thereunder."

On page 559, Circuit Judge Taft, said:

"It is settled by the cases of *Russell vs. Farley*, 105 U. S. 433, and *Meyers vs. Block*, 120 U. S. 207, 7 Sup. Ct. 525, that the court which grants an injunction, and takes an injunction bond, to save the defendant from loss caused thereby, may, in an ancillary proceeding, summarily enforce this bond against the sureties; * * *

We have no doubt that an action at law in the Federal court may be brought on such a bond, provided the necessary amount is involved, on the ground that the plaintiff is enforcing rights secured to him under the constitution and the laws of the United States."

The United States Circuit Court of Appeals for the Ninth Circuit announced the same principle in *Tyler Mining Co. vs. Last Chance Mining Co.*, 32 C. C. A. 498; 90 Fed. 15.

See, also:

Walker vs. Windsor National Bank, 5 C. C. A. 421; 56 Fed. 76.

Crane vs. Buckley, 105 Fed. 401.

Seymour vs. Phillips & Colby Const. Co., Fed. Case No. 12,689.

Coosaw Mining Co. Farmers vs. Mining Co., 51 Fed. 107.

Lea vs. Deakin, 13 Fed. 514.

Lehman vs. McQuown, 31 Fed. 138.

The last mentioned case was a proceeding

before Mr. Justice Brewer, while on the circuit, for the assessment of damages on an injunction bond.

Also, see, 2d Beach Modern Equity Practice, sec. 770 and cases cited.

The Supreme Court of Kansas in its opinion totally misconceived the law in this respect, and for reasons sufficient to itself possibly, but which are not apparent to us, did not see fit to examine the question further or to set itself right in the subsequent consideration which it gave the case on the second appeal.

The proceeding in which this bond was given was a chancery proceeding and the rules and regulations and decisions of the courts of the United States in this behalf are therefore independent rules of procedure, not referable for their determination to the statutes and procedure in the State in which the court is held and the suit determined. The jurisdiction in equity and in law is made distinct by the terms of the Federal Constitution.

See:

Robinson vs. Campbell, 3 Wheat. 212.

Bennett vs. Butterworth, 11 How. 669.

Thompson vs. Railroad Co., 6 Wall. 134.

The conformity act (Rev. St. sec. 914) has nothing whatever to do with the proceedings in equity in the Federal court, but has application only to actions at the common law.

See, *Blease vs. Garlington*, 92 U. S. 1.

The procedure in equity is regulated by rules of the Supreme Court as modified by statutes, and the constitutional jurisdiction, where no rule has been promulgated, is held to be settled by the practice of the High Court of Chancery in England prevailing when the equity rules were adopted, so far as the same may be reasonably applied.

See:

Equity Rule 90.

Russell vs. Farley, 105 U. S. 437.

The bond in the Federal court is not a bond required to be given as a prerequisite to the obtaining of the order of injunction. It is not, therefore, like the statutory bond in the State of Kansas. It is a bond that is authorized to be given in the exercise of chancery jurisdiction by the court, and its execution rests at all times within the sound discretion of the court, and its

terms and enforcement are at all times within the court's control.

Russell vs. Farley, supra.

Tyler Min. Co. vs. Last Chance Min. Co., 32 C. C. A. Rep. 498 (90 Fed. 15).

The entire basis for the decision of the Kansas Supreme Court is necessarily involved in the language which we have heretofore quoted. The premises of the court, therefore, being radically wrong, its conclusion as a necessary and inevitable consequence must likewise fail. For example, Tullock would have had the right, under the Federal law governing removal of cases, to have removed this cause for trial to the United States Circuit Court on the ground that the plaintiff's petition showed that a Federal question was involved, and that it was a suit brought, in the language of Judge Taft, "to enforce a right secured to the plaintiff by the constitution and laws of the United States and arising thereunder." Or the plaintiff could have instituted the suit in the Federal court in the first instance; or could have applied directly to the court in the main action at the proper time for an order summarily enforcing the bond against the sureties. The selection

of the forum was a matter of election upon the part of the plaintiff, subject only to the right of removal which we have shown, because such election involved merely a question of procedure. It could not vary or make any difference to the law which should be applied, or the rule which should govern the admeasurement of his damages.

"The liability of a surety on an injunction bond must be strictly construed, and he cannot be held liable beyond the precise terms of his undertaking."

1 Beach Inj., sec. 227.

The implication of law is that in executing such bond the surety does it in the view which the established practice in courts of equity attaches to such proceedings. The entire fabric of the argument of the Supreme Court resting for its foundation upon a proposition which is untenable and so demonstrated by the unbroken current of Federal authority, the decision itself must fall so far as it attempts to apply to this bond a measure of liability recognized by the State court, but distinctly discountenanced and denied by the Federal tribunals.

II.

The Federal Question was Invoked at Every Stage of the Proceeding by Defendant and is Inescapably in this Proceeding.

The rule that the Federal question must be raised in the earliest stage of the proceeding and must be fully controverted and appear in the record in the State court brought to this court, is fully met in this proceeding. The nature of the controversy here is such that it is unnecessary to particularize any question in the case as peculiarly of Federal cognizance. The entire fabric of the case is referable to the laws of the United States and the rules of jurisprudence and procedure of the Federal courts. The plaintiff's petition upon its face discloses a Federal question upon which the defendant might have filed a petition and bond for removal into the United States Circuit Court for the District of Kansas under the authority of *Tennessee vs. Planters Bank*, 152 U. S. 454; *Leslie vs. Brown*, 32 C. C. A. 556; 90 Fed. 171.

Upon the trial in the State court when the plaintiff offered evidence tending to prove the value of attorneys' fees paid, the defendant objected, among other grounds, for the reason

(p. 16), "because it appears that this bond was given in a proceeding in the Federal court, and under the law of the United States governing the liability of parties for damages on bonds in such proceedings in Federal courts attorneys' fees are not included."

This same objection was renewed and interposed continuously throughout the trial to evidence of this character, and the defendant also filed an answer invoking the same protection (p. 425 of the record).

Numerous written instructions to the jury were duly prayed by the defendant, which are set forth in the Assignments of Error and Specifications of Error in this brief, which sought to apply the rules and law of the Federal court to the determination of the liability of the surety upon this bond (pp. 269-291).

As demonstrated by both of the opinions of the Supreme Court, the question was also fairly and fully presented in that tirbunal and a decision against the right claimed by the defendant was rendered. Indeed, we apprehend that no effort will be made by our learned adversaries to escape a fair and full decision of the merits by this court, but in the absence of their brief we deem it

proper at this time and place to show to the court that it is a question concerning which the plaintiff in error is entitled to a determination by this court.

Green Bay, etc., Canal Co. vs. Patten Paper Co., 172 U. S. 58.

Dewey vs. Des Moines, 173 U. S. 193.

III.

Attorneys' Fees are Not Recoverable as Damages Upon Injunction Bond Given in Federal Court.

SPECIFICATIONS OF ERROR III, IV AND V.

The allowance of attorneys' fees as an element of damage recoverable upon an injunction bond has been upheld by the decisions of the courts of last resort in a number of States, including Kansas. The Supreme Courts of other States refuse to allow such damages and the courts of the United States, following the rule and decision of this court have uniformly refused to permit attorneys' fees to be proved and recovered in an action upon an injunction bond. In several of the Circuit Courts of the United States this rule by analogy has been made applicable also to appeal bonds operating as a supersedeas and attachment bonds.

The enunciations of this court upon this subject are clear and distinct.

See:

Arcambel vs. Wiseman, 3 Dallas 306.

Bein vs. Heath, 12 How. 168.

Oelrichs vs. Spain, 15 Wall. 230.

Russell vs. Farley, 105 U. S. 433.

This rule, as stated in *Bein vs. Heath*, is also quoted approvingly by this court in *Meyers vs. Block*, 120 U. S. 208. It has also been followed in the following Circuit Court decisions:

Browning vs. Porter, 12 Fed. 460; 2d McCrary, 582.

The Alice, 12 Fed. 502.

Jacobus vs. Monongahela Bank, 35 Fed. 396.

Fidelity Ins. Co. vs. Roanoke Iron Co., 91 Fed. 21.

The following State courts have also expressly adopted and followed *Oelrichs vs. Spain*, as stating the correct principle for guidance in that behalf:

Oliphant vs. Mansfield, 36 Ark. 195.

Dorris vs. Miller, 105 Iowa, 569; 75 N. W. 483.

Thurston vs. Haskell, 81 Me. 306; 17 Atl. 74.

Wood vs. State, 66 Md. 68; 5 Atl. 479.

Frost vs. Jordan, 37 Minn. 546; 36 N. W. 714.

Hill vs. Thomas, 19 S. C. 236.

Loeb vs. Mann, 39 S. C. 470; 18 S. E. 2.

Stringfield vs. Hirsch, 94 Tenn. 432; 29 S. W. 611.

Galveston, etc., R. R. Co. vs. Ware, 74 Tex. 50; 11 S. W. 920.

Jones vs. Rosedale, 75 Tex. 383; 12 S. W. 998.

There are a number of other State courts which have refused to allow attorneys' fees to be recovered as damages on an injunction bond, but the foregoing cases we cite principally because they follow and adopt the reasoning of *Oelrichs vs. Spain*, and fully recognize it as the authority of this court and as settling the rule in the Federal courts. The paucity of cases of the character of this one coming to the knowledge of the Federal court is ascribable to the fact that it is universally recognized by the courts and by the bar as the settled rule in Federal courts, and having been once established so firmly and clearly there has been no judicial necessity for reasserting it.

That the reasoning of the learned judge who delivered the opinion in *Oelrichs vs. Spain*, is sound, on broad principle, and meets the approba-

tion of careful jurists appears in the recent case of *Stringfield vs. Hirsch*, above cited, which case, like this, turns largely, if not entirely, upon this one question. This is a frank and full discussion of the whole subject in the light of the present state of the law, giving weight to judicial reasoning both pro and con upon the question. The court says:

"The first and most important question presented is, are counsel fees proper elements of damage in cases where attachments and injunctions are wrongfully sued out, and impounding orders wrongfully obtained? Upon this question there is abundance of authority, and an irreconcilable conflict of decisions in the courts of the several States and the Federal courts. In High on Injunctions it is held (sec. 1685) that according to the great weight of authority, reasonable counsel fees incurred in procuring the dissolution of an injunction are a proper element of damages; the amount being limited to the fees paid for procuring the dissolution, and not for the general defense of the case. This holding proceeds upon the idea that the defendant has been compelled to employ counsel to rid himself of an unjust restriction which the plaintiff has placed upon him, and hence such fees will only be allowed when motion is made to dissolve pending the litigation, and before the hearing on the merits, sec. 1686. Again, fees will not be allowed to cover the entire expense of the defense, but only for such as was incurred about the injunction. High, Inj., secs. 1688, 1690. See, also, 1 Sedg. Dam., sec. 257; 1 Suth. Dam., sec. 85; 2 Sedg. Dam., secs. 524,

525; Beach, Inj., secs. 203, 210. In these text books the principal authorities pro and con are cited and collated. A well-considered case holding the majority view is *Cook vs. Chapman*, 41 N. J. Eq. 152; 2 Atl. 286. This rule thus stated, with minor modifications, is laid down in some 26 States of the Union; among them the following: Alabama, California, Colorado, Florida, Georgia, Illinois, Indiana, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Jersey, New York, Ohio, Virginia, West Virginia. In some of these States the matter is regulated by statute, as in Iowa, Mississippi, Washington State. But the rule is held otherwise in Arkansas, Maryland, North Carolina, Oregon, Pennsylvania, South Carolina, South Dakota, Texas, Vermont, and is settled by neither statute nor decision in Connecticut, Massachusetts, North Dakota, Rhode Island, so far as we have been able to ascertain. In the United States Supreme Court and in the Federal courts, such fees are not allowed. The case of *Oelrichs vs. Spain*, 15 Wall. 211, sets forth the holding of the Supreme Court of the United States in a case very similar to the one at bar. . . .

It is insisted that the cases of *Davenport vs. Harbert*, 1 Leg. Rep. 173, and *Oelrichs vs. Spain*, 15 Wall. 211, are not exactly similar to the case at bar, inasmuch as they do not show that the fees claimed in those cases were properly fees incurred about the injunctions alone, and not in the general defense of the cases, and this criticism is just, so far as we can see from the meager reports of these cases; but at last the question, if not settled by these cases on analogies, is one of broad public policy, and should be settled in accordance with the general trend of our decisions

in similar cases, and with the wisest public policy. It is difficult to see upon what ground counsel fees incurred by the adverse party should be charged up to the defeated party any more in attachment and injunction cases than in other litigations, upon contracts or for damages for torts. The litigation may be equally unjust and oppressive in other cases, as in the case of attachments and injunctions. It is true, the latter cases are in some respects more summary, and may entail damages arising out of the seizure of defendant's property, but all this is provided for by the terms of the bond required to cover damages sustained. But counsel fees are as necessary in the one class of cases as in the other, and are neither peculiar nor more onerous in cases of attachments and injunctions than in other cases. It is said that additional fees are required to remove the attachment and injunction, and relieve from the impounding orders; but this is more imaginary than real, as the attention necessary to protect and guard against the injunction or attachment is in a vast majority, if not all of the cases, merely incidental to the defense upon the merits, and it is practically impossible to distinguish between services rendered about the attachment or injunction and those about the defense of the case generally. Any apportionment of the fees between these different services is more or less arbitrary and fanciful. But, if it were otherwise, it is at last but counsel fees of the opposite party which his adversary is called upon to pay.

It is said that in attachment and injunction cases a bond is required, the conditions of which are to pay all such damages as occur by the wrongful suing out of the writs, and that this creates, virtually, a contract on the part of the defendant to pay such damages. But we think that this is a

mistaken view of the office and reason of the bond. The liability for damages for wrongfully suing would be the same, so far as the principle in the bond is concerned, whether the bond were executed or not; and the office of the bond is not to create or regulate the liability of the pincipal, but to bring in the bondsmen, as the securities of the principal, to answer for such damages as are proper. While the liability of the sureties arises out of the execution and condition of the bond, the liability of the principal in no wise depends upon the bond or its conditions. We think that the analogies of the law, as well as the soundest public policy, demand that counsel fees in suits upon contracts, or for damages for torts, or upon attachments or injunctions, should not be regarded as a proper element of damages, even where they are capable of being apportioned so as to show the amount incurred for the attachments and injunctions as separate and distinct from the other services necessary in the case. It is not sound public policy to place a penalty on the right to litigate; that the defeated party must pay the fees of counsel for his successful opponent in any case, and especially since it throws wide the doors of temptation for the opposing party and his counsel to swell the fees to undue proportions, and, in cases of attachment and injunction, to apportion them arbitrarily between the fees pertaining properly to the attachment and injunction and those relating to the merits of the case."

An examination, if the court should deem it necessary to make such an excursion of the authorities allowing counsel fees, will disclose that they rest, not upon any sound or well reasoned exposition of public policy, but are largely redup-

licated by mere application of the rule of *stare decisis.*

The Case at Bar is a Signal Illustration of the Wisdom of the Rule in Oelrichs vs. Spain.

The temptation adverted to by the learned justice in the Tennessee case overcame the plaintiff in the case at bar and an examination of the record will disclose that he saddled upon the surety on this injunction bond substantially all of the fees of all of the counsel for all of the defendants for this entire litigation. It will be noted from the record that all of this congress of attorneys who appeared for Mulvane and the other defendants in the case, with one exception, namely, Silas B. Jones, presented large individual bills varying from three thousand to six thousand dollars each, and aggregating over twenty thousand dollars, which Mulvane paid and immediately charged against the surety upon this injunction bond.

The record discloses that with one exception all of these lawyers appeared and represented all of the defendants, including Mulvane, in an unsuccessful resistance of the application for a tempo-

rary injunction which was granted by Judge Foster. It is also shown that they filed pleadings in the case for all of the defendants including answers to the merits and pleas for want of jurisdiction; and further, that they appeared for all of the defendants in various motions which were filed to vacate and set aside the temporary injunction, and that they all appeared and were present and assisted in the argument and in obtaining the order which was finally made by Judge Caldwell at Little Rock, dissolving the temporary injunction, which order was made upon the motion of Coffin & Stanton in the case.

It appears, therefore, without contradiction and cannot be gainsaid that these attorneys performed services in respect to at least two branches of the case which, under all authority, even in those States in which attorney's fees may be recovered, form no element of such recovery; namely, first, in an unsuccessful opposition to the granting of the temporary injunction.

Sedgwick on Damages, 488.

Riddle vs. Cheadle, 25. O. St. 278.

Mitchell vs. Hawley, 79 Cal. 301; 21 Pac. 833.

Curtiss vs. Bachman, 110 Cal. 433; 42 Pac. 911.

Sweet vs. Mowry, 71 Hun. 381.

Whiteside vs. Noyac Cottage Ass'n, 84 Hun. 555.

And second, services rendered in the case upon its merits, fees for which cannot be recovered.

Mitchell vs. Hawley, 79 Cal. 301; 21 Pac. 833.

Randall vs. Carpenter, 88 N. Y. 293.

Creek vs. McManus, 17 Mont. 445; 43 Pac. 497.

Riddle vs. Cheadle, 25. O. St. 278.

Lawrence vs. Trainer, 136 Ill. 474; 27 N. E. 197.

Lambert vs. Alcorn, 144 Ill. 313; 33 N. E. 54.

Tabor vs. Clark, 15 Colo. 434; 25 Pac. 181.

Donahue vs. Johnson, 9 Wash. 187; 37 Pac. 322.

High on Inj., sec. 1685.

2d Suth. on Dam. 64.

This is for the reason, as stated by the Supreme Court of California in *Mitchell vs. Hawley*, *supra*, that the allowance of attorneys' fees is exceptional and should not be carried beyond the point to which former decisions have taken it.

In brief, then, these attorneys presented a charge in gross which necessarily included the

following three elements of valuable services for which Mulvane was entitled to no recoupment: First, for services in resisting the application for a temporary injunction. Second, for services upon the merits of the cause; and third, for services on behalf of the other defendants to the cause, including the dissolution of the injunction; all liability for which had been released by such other defendants by the stipulation set forth in the statement of this case.

It becomes interesting to inquire upon what theory the Supreme Court of Kansas permitted this recovery, beyond all rule and precedent. The entire subject is brushed aside by the Supreme Court with the single statement that the plaintiff in error is mistaken as to the facts. In answer to this it is only necessary to cite this court to the pages of the record which establish these facts and challenge our adversaries to produce a scintilla of evidence to show the contrary.

See pages 107 to 123 of the record, establishing that these attorneys appeared in resisting the temporary injunction and services performed.

Pages 125, 129, 130, 136, 144, 146, 149, 151 and 165, setting forth various appearances, answers and pleas of the defendants, and applica-

tion of Woodbury & Moulton to be made parties defendant, and argument before court thereon and denial of same, being services performed upon the merits of the cause.

Testimony of A. A. Hurd, pages 56 and 57; of Eugene Hagan, pages 79, 82 and 83, and of J. D. McFarland, page 85, to the effect that they performed services for defendants other than Mulvane, including services going to the merits of the case; that their entire bill was paid by Mulvane in gross and without any separation or apportionment as to the several defendants or to the several branches of the litigation concerning which the services were rendered.

To the first objection, namely, the inclusion of services prior to the temporary injunction, no attempt even was made by the defendant in error to explain or excuse. In answer to the objection of including the value of services upon the merits of the cause, it is argued that it became necessary to perform these services upon the merits in order to accomplish a dissolution of the injunction. So far from this argument aiding the contention of the defendant in error, it completely disproves his right to any attorneys' fees, because, if they were incapable of separation no attorneys' fees

could be allowed, under all of the authorities which sustain this element of damages. The burden lay upon the plaintiff to apportion his attorneys' fees and to establish the value of those services restricted and limited to a successful effort to dissolve the injunction. It was not for the defendant to make this proof and it is no answer for the plaintiff to say that it is incapable of proof. No authority excepts from the operation of this general rule cases where other services are so commingled that they are incapable of separation, but on the contrary that circumstance renders the entire measure of attorneys' fees irrecoverable.

In answer to the third and last objection, that Mulvane was recovering for services which had been rendered for other defendants in the case, we are met with the assertion that Mulvane was the sole party really interested in this litigation and that he paid the bills and assumed the entire burden of the litigation. The significance of this contention on the part of Mulvane becomes apparent when it will be observed from the stipulation of October 7, 1890, that these other defendants represented by these same attorneys entered into a binding stipulation with the complainants

whereby for a valuable consideration, which they received at the time, they released and discharged this bond from all liability.

By the grace of the complainants in making this stipulation the two water companies were released from this injunction and were permitted to carry out the resolutions of their boards of directors for the issuance and exchange of their bonds and stock, and Messrs. Coffin & Stanton were permitted to acquire possession of the same, and Mr. Mulvane was permitted to carry out his contract with Coffin & Stanton resulting in a very large increase of profit to himself over the contract which he had previously made with Wescott and Hanson. No suggestion was at that time made and no notice given of any sort to the complainant that Mr. Mulvane was the sole party in interest in the suit and that for the services rendered to these water companies and to Coffin & Stanton he made himself chargeable as to counsel fees.

This dilemma, therefore, is presented to Mulvane in this suit; namely, if the two water companies and Coffin & Stanton were mere dummies and represented Mulvane, although appearing to be active parties and participants in the suit, then the stipulation includes Mulvane in its terms so

far as the waiver of damages is concerned. If they were active and real parties in the suit and the services rendered in their behalf have been paid for by Mulvane, then there was no apportionment of the fees or charges relating to the dissolution of the injunction which Mulvane might rightfully personally claim, and therefore none could be recovered.

But apart from all this, it is no answer to say that Mr. Mulvane was solely interested in and assumed the burden of this litigation and therefore is entitled to recover, for the reason that it became necessary for these attorneys of Mulvane to clothe these other defendants with an apparently vital and substantial interest in the controversy which made it necessary for them to file pleadings and to do other things looking to the merits of the case which cannot be recovered for on the bond.

IV.

The Federal Construction of Liability Upon the Bond Binding Upon the State Courts.

It is true, as has been noted by the Kansas Supreme Court, that there is no act of Congress that in express terms authorizes a judge of the

United States Circuit Court to require a bond as preliminary to the issuance of a writ, or which fixes or determines the nature of liability of such a bond. The right to issue a writ of injunction by a Federal judge is referable solely to the constitution and laws of the United States conferring jurisdiction upon such courts. The first section of article III of the constitution confers all the judicial power of the United States upon one Supreme Court and such inferior courts as Congress may from time to time ordain and establish. The second section fixes the jurisdiction of these courts, and among other elements of jurisdiction ordains that the judicial power

> "shall extend to all cases in law and equity . . . between citizens of different States."

The jurisdiction as to the subject-matter of controversies by force of this provision of the constitution is of necessity preserved in all acts of Congress concerning jurisdiction upon the Federal courts. The essential separation and distinction between jurisdiction at law and in equity in cases in the Federal court has been consistently preserved and recognized by repeated decisions of this court. We cite only a few:

Robinson vs. Campbell, 3 Wheat. 212.

Bennett vs. Butterworth, 11 How. 669.

Thompson vs. Railroad Co., 6 Wall. 134.

The conformity act (Rev. St., sec. 914), which makes the practice and pleadings of the court of the State at common law analogous rules for the Federal courts, has nothing whatever to do with the exercise of chancery jurisdiction in the latter tribunals.

See, *Blease vs. Garlinghouse*, 92 U. S. 1.

The equity practice of the United States Circuit Courts is governed by the rules of practice prescribed by the Supreme Court of the United States and by the several Circuit Courts and Circuit Courts of Appeal not inconsistent therewith, and in the absence of such rules, by the practice of the High Court of Chancery in England prevailing when the equity rules were adopted, so far as the same may reasonably be applied.

See:

Equity Rule 90.

Russell vs. Farley, 105 U. S. 437.

A suit for injunction in the Federal court is exclusively of equitable cognizance. The power of the Federal court, therefore, to issue an injunction writ and to exact a bond does not rest upon the statute of any State, but the right to impose

the terms upon which the injunction shall be granted is one of its inherent equitable powers which may not be enlarged, restricted, or in any manner modified or affected by any State legislation or the rule of practice of any State court.

It follows, therefore, that inasmuch as the Federal court derives its power from the constitution and laws of the United States to issue the writ and determine and exact the terms and conditions upon which it shall be issued, it must of necessity have the power of determining the liability upon any injunction bond and to mitigate or absolve the obligors upon such liability. In other words, no vested right accrues to any damages by virtue of the execution of such bond in behalf of any obligee. This view is so aptly and concisely stated by this court in *Russell vs. Farley*, that, for the convenience of the court we place it upon our brief, as follows (p. 442):

"Besides, the power to impose a condition implies the power to relieve from it. If, for example, it is deemed proper, upon an application for an injunction, to require, as a condition of granting or withholding it, that a sum of money should be paid into court, or that a deed or other document should be deposited with the register, and the developments of the case are afterwards such as to make it manifestly unjust to retain the fund or document and deprive the owner of its

use, the court assuredly has the power (though, undoubtedly, to be exercised with caution) to order it to be delivered out to the party. When the pledge is no longer required for the purposes of justice, the court must have the power to release it, and leave the parties to the ordinary remedies given by the law to litigants *inter sese*. . . . On general principles the same reason applies where, instead of a pledge of money or property, a party is required to give bond to answer the damage which the adverse party may sustain by the action of the court. In the course of the cause, or at the final hearing, it may manifestly appear that such an extraordinary security ought not to be retained as a basis of further litigation between the parties; that the suit has been fairly and honestly pursued or defended by the party who was required to enter into the undertaking, and that it would be inequitable to subject him to any other liability than that which the law imposes in ordinary cases. In such a case it would be a perversion, rather than a furtherance, of justice to deny to the court the power to supersede the stipulation imposed."

The Supreme Court of the State of Kansas in the case of *Mulvane vs. Tullock*, (first appeal), uses the following language:

"It [the bond] is not a mere incident of the injunction proceeding, nor can this, which is an ordinary action at law, be regarded as auxiliary to the proceeding in the Federal court. Being an *independent contract*, actionable in any State court where service upon the sureties can be obtained, the interpretation of the forum applies."

This mistaken notion of this bond arises from

the fact that such bonds in Kansas are required by statute, and being so regulated and given, possess all the elements of independent contracts. No injunction under this statute can have any force or effect until the bond is filed and approved as required by the statute. Legal remedies and rights strictly legal may, under the Kansas procedure be commingled in the same action with matters of purely equitable cognizance, and an injunction may issue as an incident to an action at law. The contrary is true in the Federal court, not because it might not be convenient and desirable by litigants, but because under the construction of the constitution of the United States by this court in its decisions, no such power exists in the Federal tribunals.

The power to make rules governing the practice and procedure in equity is conferred by act of Congress upon the Supreme Court of the United States. Inasmuch as the powers of the Circuit Courts of the United States to entertain injunction proceedings are derived from the constitution and the judiciary act, and are in the nature of general equitable powers, the exercise of such powers is in pursuance of such Federal authorities and the courts thereby derive the power to grant an in-

junction without bond, or to dispense with a bond after it has been granted, or by rule to limit and control the liability upon such bond. The Federal courts in this behalf are all-powerful. There is devolved upon them as to the rights of parties under such a proceeding powers that are the exact equivalent in that behalf to the legislative powers of the State.

See, *Russell vs. Farley, ubi supra.*

It was urged, and the court must have decided that we were asking it to dispense with or modify, or overrule the decisions which it had made upon the subject of bonds in State courts. This was a mistaken notion. We were simply asking that the rules established by this court should be applied to the determination of the liability upon this bond. There is, and can be, no conflict of decision when properly considered.

It may be contended that in the absence of a formal rule limiting the liability upon an injunction bond promulgated by this court the State court was free to adopt a rule of its own. But it cannot be successfully contended that a decision of this court limiting and fixing such charges and such liabilities as may be recovered as damages, is of less sanctity and force than a rule in equity.

Further, it would be foreign to the purpose of such rules to embody in them any limitation upon the liability upon bonds.

This very question was before the Supreme Court of the United States in the case of *Bein vs. Heath*, 12 How. 168. A bill had been filed in the Circuit Court of the United States by Mary Bein to enjoin the seizure and sale of property which she claimed to be her separate estate and not charged with the payment of the debt. The bond was of the form in use in the State courts of Louisiana in cases where the law requires an injunction bond to stay execution on a judgment or order of seizure and sale. The condition of the bond was as follows:

"Now, the condition of the above obligation is, that we, the above bounden Mary Bein and Gilbert S. Hawkins and James McMasters, sureties, will well and truly pay to the said Mary Heath, the defendant in said injunction, and plaintiff in said case of seizure and sale, all such damages as she may recover against us in case it should be decided that the said injunction was wrongfully obtained."

The court entered a decree dissolving the injunction and authorizing the respondent to proceed with a writ of seizure and sale, granted in accordance with the prayer of her original petition, and

thereupon suit was brought upon the injunction bond and certain damages were recovered which would be allowable upon bonds of a similar character under the laws of Louisiana, where an injunction was obtained to stay execution upon an order for the seizure and sale of mortgaged property. Under the Louisiana laws the party who obtained an injunction and failed to support it at the trial was subject to have judgment given against him and his sureties for the debt, interest and damages at the time the injunction was dissolved. The sureties on the bond were treated as parties to the suit and the amount of interest and damages which the court might award by its judgment was regulated by the laws of the State.

For our convenience and that of the court, and as part of this argument, we quote liberally from the opinion of the court in this case, as follows:

"It is with reference to this mode of proceeding that the injunction bond in question appears to have been framed; and it is to this judgment, as prescribed by the laws of the State, that the condition must refer when it binds the obligors to pay all such damages the obligee might recover against them, in case it should be decided that the injunction was wrongfully obtained. There must be a recovery; that is, a judgment against them, before the condition is broken, and before any proceeding could be had upon the bond.

Now, there is manifest error in subjecting the parties to an injunction bond, given in a proceeding in equity in a court of the United States, to the laws of the State. The proceeding in a Circuit Court of the United States in equity is regulated by the laws of Congress and the rules of this court made under the authority of an act of Congress. And the ninetieth rule declares that, when not otherwise directed, the practice of the High Court of Chancery in England shall be followed. The eighth rule authorizes the Circuit Court, both judges concurring, to modify the process and practice in their respective districts. But this applies only to forms of proceeding and mode of practice, and certainly would not authorize the adoption of the Louisiana law, defining the rights and obligations of parties to an injunction bond. Nor do we suppose any such rule has been adopted by the court. And if it has it is unauthorized by law, and cannot regulate the rights or obligations of the paries.

And when an injunction is applied for in the Circuit Court of the United States sitting in Louisiana, the court grant it or not, according to the established principles of equity, and not according to the laws and practice of the State in which there is no court of chancery as contradistinguished from a court of common law. And they require a bond, or not, from the complainant, with sureties, before the injunction issues, as the court, in the exercise of a sound discretion, may deem it proper for the purposes of justice. And if, in the judgment of the court, the principles of equity require that a bond should be given, it prescribes the penalty and the condition also. And the condition prescribed by the court in this case, but which was not followed, is the one usually directed by the court.

In proceeding upon such a bond, the court would have no authority to apply to it the legislative provisions of the State. The obligors would be answerable for any damage or cost which the adverse party sustained, by reason of the injunction, from the time it was issued until it was dissolved, but to nothing more. They would certainly not be liable for any aggravated interest on the debt, nor for the debt itself, unless it was lost by the delay, *nor for the fees paid to the counsel for conducting the suit.*"

The plaintiff in error as surety upon this bond, has, under familiar principle, a right to rely upon the force of decisions of this court fixing and determining his liability. Such decisions enter into his bond to the same extent as if their purpose and effect were set out in the instrument itself. If the bond had contained a recital of the rules of decision of the Supreme Court at length, exempting the surety from liability for attorneys' fees, it would hardly be contended that such liability would accrue notwithstanding. But being the law under which the court acted which ordered the bond to be executed, the rule of such decisions is as fully a part of the bond by implication as if it were fully set forth therein. Dealing with this as a contract, or even as an independent contract, as the Supreme Court of Kansas did, it was the duty of that court to so construe it as to

determine what was the meaning and the intention of the parties thereto at the time. From the time when *Hadley vs. Baxendale*, 9 Exch. Rep. was decided, continuously by a long line of decisions to the present time, parties to contracts are only liable for such consequences as were the direct result of the breach and were in their contemplation at the time of the formation of the contract. That the sureties were aware of the law announced by this court governing injunction bonds is conclusively presumed. They could not be heard to assert the contrary. Knowing such law, therefore, and the extent of liability they were assuming as limited and fixed by such decision, the sureties cannot be held to have assumed a greater liability.

In the case of *Olcott vs. Supervisor*, 16 Wall. 690, this court said:

"Parties have a right to contract, and they do contract in view of the law as declared to them when their engagements are formed. Nothing can justify us in holding them to any other rule. If, then, the doctrine asserted in *Whiting vs. Fond du Lac County* is inconsistent with what was the recognized law of the State when the county orders were issued, we are under no obligation to accept it and apply it to this case."

To the same effect, see, *Burgess vs. Seligman*, 107 U. S. 20; *Mix vs. Vail*, 86 Ill. 40.

The rule is obvious that in all cases where the nature of the controversy is such that a writ of error will lie from this court, it should be the duty of the Supreme Court of the State to decide and apply any rule or principle of law *pro hac vice* established by this court. As to all such cases it is equally obvious that the Supreme Court of the State is an inferior court and is bound by the rules and decisions of this court as by paramount law. This would seem too clear to ever have been mooted and decided, but it has been settled in two cases by very respectable authority. In the case of *Belcher vs. Chambers*, 53 Cal. 635, the court held:

"When the question upon which the judgment of this court depends is such as may be re-examined upon writ of error by the Supreme Court of the United States, we will follow the rule of law with respect to such question laid down by the Supreme Court of the United States."

In the case of *San Benito County vs. Southern Pacific R. R. Co.*, 77 Cal. 518, this principle was again enunciated with added emphasis as follows:

"In cases where a writ of error will lie to the Supreme Court of the United States, the decisions of that court will be followed in this court in preference to former decisions of this court."

The United States Circuit Court in the principal

case out of which this bond grew (namely, the case of *Wescott and Hanson vs. Mulvane et al.*) did that which, as already shown, could not have been done in the State court; namely, it accepted a cash deposit as security for the damages that might be suffered if it should finally be held that the injunction was wrongfully granted. Now, assuming that nothing more than to put up this money had been done, how much of such money of the principals of the bond who put it up would or could have been taken by the Federal court or allowed to be taken by that court in satisfaction of damages.

Assuming that the case had gone to its conclusion and the injunction had been dissolved, and the United States Circuit Court for Kansas had remitted Mulvane to his action at law for damages, such action might have been prosecuted in the State as well as in the Federal court, but any judgment which should be rendered in such action must of necessity have been satisfied out of the funds in the custody of the United States Circuit Court. Can it be conceived that a judgment obtained in the State court and sought to be enforced against such fund upon an element of liability forbidden by a decision of the Supreme

Court of the United States, would have had the sanction of the Federal court, or, if prosecuted in the Federal court subsequently against the fund, would have been upheld by this court? Certainly, the control of the Federal court over this fund was exclusive, and if the obligees who claimed to be damnified had gone in and asked the court to assess their damages, it could not have allowed them a penny for attorneys' fees, and the fund would not have been diminished one cent by such allowance. But the sureties upon this bond stepped in and did what? They took the place of the $75,000 deposit. Can it be contended for one moment that they assumed or could be held to have assumed any higher or greater liability for damages than might have been assessed against and collected from this fund? The significance of this situation is all the greater when the court shall recall that the bond in this case upon which this suit was brought was not given until long after the liability, if any, had accrued which was chargeable upon this fund in court; in other words, the bond was not given or the fund withdrawn from the court until one month after the injunction had been dissolved. There is no escaping the proposition that the bond

was intended by all parties as a mere substitute for the fund in court.

Under the decision of *Russell vs. Farley, supra*, and other cases which we have cited, Mulvane could have gone into the Federal court in the case in which the bond was given and have asked the court to make the necessary order to subject not only the sureties but the principals to the payment of damages. Under these circumstances the principals would not have been compelled to pay attorneys' fees.

This presents the anomaly, not to say the judicial outrage, that there is one and a very much greater liability for the sureties and another and very much less one for the principals upon this bond. To illustrate this point further, the record in the present case shows that the sureties alone upon this bond were sued and service was obtained only upon Tullock. Tullock is and was at the time of the institution of the suit a citizen of the State of Kansas. The defendant in error being likewise a citizen of the State, brought suit in the State court to obtain jurisdiction of Tullock. Tullock had a right to assume in remaining in the State court that the State court in dealing with a bond of this character would fix

his liability according to the rules and decisions of the Supreme Court of the United States, and would not visit or impose upon him a liability greater than that which might be imposed upon his principal who might have been proceeded against summarily without the service of process in the Federal court in the cause in which the injunction was granted. He had an election, therefore, to stay in the State court or to remove. That election might be governed by the relative expensiveness of litigation in the one or the other tribunal. But it was not thinkable that a rule of decision in the State court might be made to serve the purpose of a heavy penalty for his remaining therein and his failure to remove into the Federal court.

The question involved in this branch of our argument was one of first impression in Kansas at the time this case was presented. By reference to the opinion of the court upon the first appeal (*Mulvane vs. Tullock*, 58 Kan. *ubi supra*) certain decisions of State courts were presented by counsel and adopted by the Kansas court as upholding its view. These cases were few in number. An examination of the authorities we think will satisfy this court completely that this

question, namely, the right of a State court to independently determine the liability of a surety upon an injunction bond given in a case in the Federal court and to abrogate and set aside the rule of decision as to such liability of this court, *quo ad hoc*, has never yet fairly been presented to any State Supreme Court or fully and fairly considered and decided, and is still, so far as State courts are concerned, a question undetermined and at large, except in this case and in the decision of the Supreme Court of the State of Kansas therein.

We will first briefly examine the case of *Mitchell vs. Huzley*, 79 Cal. 301. This case, we have cited as an authority very strongly in our favor against the contentions of defendant in error upon another branch of this argument; but in so far as it assumes to determine the question now under consideration, although such question was mooted in the case, it is not authority, and the language of the court in that respect is *obiter dictum*. By reference to the case it will be seen that the court finally decided against the allowance of attorneys' fees upon other grounds, and therefore it was not necessary for the court to determine the question as to the right of its independent

judgment against the authority of *Oelrichs vs. Spain*. The Federal question as presented in the case was in the alternative; that is, it was contended that attorneys' fees were not recoverable, because not apportioned; but if the court should hold that they were apportioned and were recoverable, then the rule of the Federal court precluded their recovery. The court held the first proposition in favor of the defendant in error in that case and therefore had no occasion to decide the other question, and its determination may not be drawn into precedent. An examination of this case, too, will show that no briefs of counsel are printed and none of the Federal authorities which we have heretofore cited was discussed or passed upon. So far as the record goes, there was no fair or full presentation of the question to the court. No authorities in support of the *dictum* are cited by the court and no opposing authorities seem to have been considered. The reason given for its view by the Supreme Court of California, in the light of the authorities which we have already cited to the court, do not commend themselves to the judgment. The reasons given are that the sureties could not know that they would be sued in the Federal court and by reason of citizenship

might not be sued at all in that court, which is begging the whole question here presented and clearly avoiding its decision.

The two cases in the Missouri Court of Appeals which are referred to by the Supreme Court of Kansas are of an inferior court of Missouri, which, under section 12 of article 6 of the constitution of the State of Missouri, forbids the Missouri Court of Appeals making a final decision upon this question. An examination of those cases shows that the Federal authorities upon this subject were neither cited not examined by the court rendering the decision and the cases embodied in the opinion as supporting the view of the court in this behalf upon examination will be found to have no relevancy to the question here under discussion.

The case of *Corcoran vs. Judson*, 24 N. Y. 106, cited by the Supreme Court of Kansas in its opinion in support of its view, will be found upon examination to be an action upon an injunction bond, given, it is true, in the Federal court, upon which counsel fees were allowed as damages, but concerning the allowance of which no objection was made and no question raised by the parties to the suit, and the question here propounded was neither mooted nor considered.

That the Kansas court failed to justly discriminate and understand the cases that were cited is forcibly illustrated in its commentary upon the case of *Meyers vs. Block* as follows:

"Attention has been called to *Meyers vs. Block*, (120 U. S. 207,) cited as an authority in behalf of defendant, which was a case from Louisiana. The Supreme Court of Louisiana allows attorneys' fees as damages upon an injunction bond given in a Federal court, and in *Meyers vs. Block* the judgment of that court was affirmed by the Supreme Court of the United States. The report of the case does not clearly show the damages sought to be recovered in the case, or that attorneys' fees were involved. In the late case of *Aiken vs. Leathers, supra*, in referring to the cases taken from that State to the Supreme Court of the United States, the court says:

'Now, a reference to the records of those cases shows that counsel fees were an element of damages in the demand as well as in the proof. Hence, we feel authorized to conclude that the decisions which we have considered and consulted are not to be construed as excluding counsel fees as an element of damages in an action at law in a Federal court, and *a fortiori* in a Louisiana court, for the recovery of damages on a bond of injunction given in and by the order of a Federal court in an equity proceeding.' "

The case of *Meyers vs. Block* will be examined in vain to find any allusion whatever to attorneys' fees or that any question of attorneys' fees ever arose in the case or was brought to the attention

of this court. We cited it in our brief before the Supreme Court of Kansas, as we have cited it here, for the single purpose of showing that an injunction bond given in the Federal court and under the order of such court involve a Federal question, which would be reviewed in all its scope by this court upon writ of error.

The quotation from the opinion above quoted also shows the sedulous effort made by the Kansas court to avoid the force of the plain rule forbidding attorneys' fees upon Federal injunction bonds. An examination of the authorities referred to by the Kansas court will illustrate the instability, if not the unfairness, of the position taken upon the strength of those cases.

The case of *David Block vs. Meyers & Levi* was a simple action instituted in the State court upon an injunction bond exacted in a bankruptcy proceeding by order of the United States District Court. There were but four questions presented for decision of the State court in the suit upon this bond. The opinion and entire decision do not occupy exceeding a full page of the report in 35 La. Ann., p. 220, and the court there decided, first, that the bond was given in substantial compliance with the order of the court. Second, that

such bond was actionable against the sureties without preliminary suit against the principals or proving that its conditions had been broken. Third, that the bond under the circumstances in which it was given covered damages previously accrued, as well as those which arose after its execution. Fourth, that in a suit upon such bond malice could neither be pleaded nor proven. This is all the record of the case which can be found by the most diligent search of the records and reports of the Supreme Court of Louisiana, unless, perchance, one should take the trouble to make an excursion through some pleadings or transcript of testimony which were not embodied in any of the published reports.

And the court in *Aiken vs. Leathers*, as will be observed, did not declare that the question of granting attorneys' fees was controverted, or even that attorneys' fees were allowed, but simply limits its statement to the assertion that attorneys' fees were "an element of damage" in the case.

Meyers sued out a writ of error in this court to the Supreme Court of Louisiana in the case of *Block vs. Meyers & Levi*. The only specifications of error submitted to this court are to be found on page 209 of 120 U. S. and are as follows:

"First. The Supreme Court of Louisiana erred in subjecting the plaintiffs in error to the law and jurisprudence of Louisiana, when they were parties to an injunction bond given in equity in and by order of the Federal court.

Second. The Supreme Court of Louisiana erred in holding that the bond was regular.

Third. The Supreme Court of Louisiana erred in holding that an action could be maintained on the bond in suit before its condition was broken.

Fourth. The Supreme Court of Louisiana erred in holding that the bond in suit, construed with the order requiring it, could cover and bind the obligors for damages which had been sustained before it was given."

It will be observed, however, that the court examined the entire record and passed upon every question connected with the case and thereby asserted its right to review in toto the case as one presenting a Federal question. That no question of attorneys' fees was before this court or even mooted in argument, may be found by a careful consideration of the whole case itself; but if the case has any significance upon this point it is to affirm the doctrine of *Oelrichs vs. Spain*, because this court, in the case of *Meyers vs. Block*, quotes approvingly the language of the case of *Bein vs. Heath*, as follows:

"They [the obligors of the bond] would certainly not be liable for any aggravated interest on the debt, nor for the debt itself, unless it was lost

by the delay, *nor for the fees paid to the counsel for conducting the suit.*"

We conclude, therefore, by asserting that with the exception of the Kansas Supreme Court in this case, no decision of any Supreme Court can be found, save the *dictum* in the California case above referred to, where, upon challenge, full faith and credit has not been given to the rules and decisions of this court in this behalf.

V.

The Condition Upon Which the Liability of This Bond Depended Never Happened by Reason of the Affirmative Act of the Parties in Entering Into the Stipulation Appearing Upon Page 175 of the Record. See Specifications of Error Nos. VI and VII.

This bond, being one issued by a judge of the Federal court in a cause depending in that court in chancery and in pursuance of its equitable powers, we contend that all of the incidents of the bond and all measure of liability upon it are matters of Federal cognizance and are subject to the review and determination of this court. We therefore insist that the court erred in overruling

the assignment of error which we made in the court below and which we have renewed here, being specifications of error Nos. VI and VII of our brief.

In the petition or complaint in the trial court the breach assigned of the bond conforms to the language of the bond, and is as follows (p. 8):

"Plaintiff further alleges that such further proceedings were had in the said suit pending in the Circuit Court of the United States for the District of Kansas, that it was finally decided that the said temporary injunction was unlawfully issued and that the said complainants were not entitled to the said injunction."

The proof which was adduced to sustain this averment was the stipulation of October 7, 1890, hereinbefore set out. An objection to this evidence was interposed for the reason, among others, that it was a clear variance from the allegations of the petition (p. 11), and that it did not establish in any event a right of action upon the bond. The Kansas Supreme Court has held in *Brown vs. Galena Mining Co.*, 32 Kan. 528, that a suit upon the bond is maintainable either after the final determination of the case in favor of the defendant or upon a voluntary dismissal by the plaintiff, but it has not decided that the two are interchangeable terms. While the cause of action may accrue

upon either contingency, they are none the less distinct contingencies and distinct grounds of action. Proof of nonsuit is not proof of a final judgment, and an allegation of the one does not warrant proof of the other.

However, defendant in error's entire theory was predicated upon the legal effect of this stipulation of October 7, 1890, and he requested the court upon the trial to instruct the jury as follows (p. 267):

"The jury are instructed that the action of the United States Circuit Court for the District of Kansas in dissolving the temporary injunction in the case of *Wescott and Hanson vs. Joab Mulvane et al.*, above referred to, was made final by the voluntary withdrawal by complainants in that case, on the 7th day of October, 1890, of so much of their bill as sought a specific performance of the alleged contract, and that thereafter the said Joab Mulvane had the right to maintain a suit upon said injunction bond to recover whatever damages he might be entitled to thereunder."

The court refused to give the instruction as tendered, but referred to the jury the legal effect of this stipulation, and whether or not it did constitute in law an abandonment of plaintiff's bill for an injunction, so that thereafter a suit might be brought for damages by Mulvane. (See instruc-

tion No. 5, p. 272.) The jury doubtless resolved this proposition of law in favor of the plaintiff.

In order to uphold this verdict, it must appear not only that the court, at the time and in the manner referred to, had the right and power to pass upon this proposition, but also that it arrived at a correct conclusion; because at the time of the bringing of this suit there had been no final determination of the cause as we shall hereafter argue, and the plaintiff could therefore only proceed by proving that the bill for an injunction had been voluntarily abandoned and dismissed.

Was the stipulation and order made pursuant thereto of a character to confer such right of action and did it meet the terms of the bond in that behalf? The court will bear in mind that this injunction went upon a cash deposit. No bond for any sum of money was given at the time, but the deposit remained until after the circuit judge had entered the order dissolving the injunction on April 4. At the time the bond was executed, therefore, the injunction had been granted and had been dissolved. What can be said, under the circumstances and with that condition of the record, to have been within the contemplation of the surety at the time he made his bond? The court cannot presume that Tullock,

in going security upon this undertaking, believed that he was assuming a liability which had fully accrued and was no longer contingent in its character. With an order dissolving the injunction already made in the case, he must have known that this liability could be avoided only by obtaining an ultimate decision in the case sustaining the rightfulness of Judge Foster's order in awarding the injunction originally. He must necessarily have contemplated a prosecution of this suit and the reversal of the order of dissolution which had been made and the reinstating of the injunction. The bond was given, not to discharge and satisfy a liability already accrued, but to protect and save the complainants harmless from such liability, and this is made clear by the full recitals in the bond itself, and the exact and precise specification of the nature and extent of the liability assumed and the contingencies upon which it should be made to depend. Under the most extreme construction the surety cannot be said to have contemplated further than that the plaintiff should, of his own motion, voluntarily and without beneficial agreement with any other party to the cause, abate the proceeding. It could never have entered his mind in this state of the record, with this liability stand-

ing as it did, that the complainants and the defendants should get together and agree upon a settlement under the terms of which the bill for an injunction should be withdrawn and the very purpose which animated his executing the undertaking frustrated. Can a settlement made under such circumstances as these be said to meet either the letter or the spirit of this bond and the contingency under which a liability should accrue? In this particular case Mr. Mulvane undertakes to testify that he alone was the party who was vitally interested as a defendant; that the defendants other than he were mere men of straw, and that he assumed the entire burden of defense in paying for all of the counsel in the case, and that whatever was done ostensibly on behalf of the other defendants, was in reality and in fact done for and on behalf of Mulvane (see Mulvane's testimony). If this be so, of course then the stipulation which was signed by Mulvane's attorneys for these other defendants must be of necessity his stipulation. If these parties were the mere agents of Mulvane, and if the attorneys who represented them were *pro hac vice* his attorneys, then the release and stipulation in the case was by the acquiescence and agreement of all of the parties

to it effectual and forever annulled the liability of this defendant upon the injunction bond.

But be that as it may, if the court can hold that this stipulation had the effect contended for by the plaintiff and that Mulvane's right to damages was saved, then we insist that its practical effect was to render impossible of occurrence the contingency upon which the liability of the surety was made to depend. The law contemplated, as Tullock had a right to contemplate, that this case would be maintained in the condition it was at the time the bond was made until the subject out of which the bond grew, namely, the rightfulness of the issuance of the injunction, should be "*finally decided*;" that there should be, at least so far as the parties to the suit were concerned, a continuing effort to have such determination made and reached. The surety could not be held to have anticipated that afterwards the parties by stipulation would in effect change this suit from an equitable action for specific performance with injunction as an incident, to an ordinary suit at law for damages, and thereby make it impossible to have the determination of the fact upon which the liability of the sureties was predicated. The Circuit Court of Appeals decided, as did the Supreme Court of

Kansas, that the effect of this stipulation withdrawing so much of the suit as asked for a specific performance of necessity carried with it the injunction, and therefore the court could not review the action of the court below and could not decide whether the injunction was rightfully or wrongfully granted in the first instance. The practical effect of the action of these parties was to dismiss the bill, and this having been done by agreement of both parties, it relieved the surety from any liability upon the bond.

A case in point is *Palmer vs. Foley*, 71 N. Y. 106, a part of the syllabus of which is as follows:

"There is no breach of the condition of the statutory undertaking unless the court finally decides that plaintiff was not entitled to the injunction, or unless something occurs equivalent to such a decision.

A temporary injunction order was granted herein restraining defendant from intruding into the office of deputy chamberlain of New York City, or performing any of its functions, or exercising its powers; the order was subsequently modified by the court by allowing the defendant to institute legal proceedings to test his claim to the office. Under an act of the Legislature, passed during the pendency of the action, plaintiff was deposed from the office of chamberlain, which he held at its commencement. Leave was granted defendant to put in a supplemental answer, setting up the statute and plaintiff's removal thereunder, and to plaintiff to discontinue, in ten days

thereafter, on payment of costs. Plaintiff did not discontinue within the time specified; but thereafter, on stipulation of the parties, and on payment of $100, an order of discontinuance was entered. *Held*, that this was not equivalent to a final decision of the court that plaintiff was not entitled to the injunction order when it was granted; that there was no breach of the condition of the undertaking and no right of action thereon; and that, therefore, an order directing a reference to ascertain defendant's damages, sustained by reason of the injunction, was improperly granted."

On page 109 the court said:

"It follows that the reliance of the defendant is upon the bond or undertaking given by sureties and then he has no greater or other reliance than is afforded by the terms of the instrument which they have executed. Sureties can be held no further or otherwise than they have agreed. (*Drummond vs. Husson*, 14 N. Y. 60.) . . . The action was never finally determined by judicial decision. By amicable and voluntary agreement of the parties, it was discontinued on the plaintiff paying $100 costs to the defendant and, by consent of parties, a special term order was made carrying that agreement into effect and the action thus came to an end. It is claimed that this is equivalent to the court finally deciding that the plaintiff was not entitled to the injunction order. Cases are cited which almost hold to that effect. I will not name them. In most of them there was some action of the court upon the validity or merit of the injunction order adverse to the plaintiff's right to have had it allowed. The plaintiff after such action discontinued of his own motion and presumably in consequence thereof. In none of them was the discontinuance

a matter of agreement between the parties to the action."

To the same effect, see, *Johnson vs. Elwood*, 82 N. Y. 362, the syllabus of which is as follows:

"Where a temporary injunction, restraining defendant from entering certain land, was dissolved by stipulation, and afterwards he died, and on motion of administratrix to compel plaintiff to elect whether he would discontinue or proceed against her, he discontinued: *Held*, that an order of reference to ascertain damages by reason of the injunction could not be granted, as the action abated upon defendant's death, before trial, and the cause of action did not survive.

Held, also, that there was no breach of the undertaking which provided for the payment of damages in case the court should finally decide that plaintiff was not entitled to the injunction, as there had been no such decision."

Also, see, *Tyler Min Co. et al. vs. Last Chance Min. Co.*, 32 C. C. A. 498; 90 Fed. 15, the second paragraph of the syllabus of which is as follows:

"Under the rule that the liability of a surety cannot be extended by implication beyond the express terms of his contract, sureties on a bond given to procure a restraining order, which order required the defendants to cease working a certain portion of a mine, and to refrain from removing or appropriating ore previously taken therefrom, cannot be held liable for damages accruing to defendants after a subsequent order which continued such restraining order in force, but modi-

fied and changed it by permitting the working of the mine, and the disposition of the ore taken therefrom, under regulations prescribed by the court."

The following are also a few of the pointed decisions:

"The dismissal of a bill in equity by agreement of parties, after injunction had issued, is not such a final determination that the injunction was wrongfully issued as fixes the liability of the sureties on the injunction bond."

Large vs. Steer, 121 Pa. St. 30; 15 Atl. 490.

"No action can be maintained on an injunction undertaking, except in accordance with its terms, and this is true with respect to the principal as well as the sureties.

Where in a suit for specific relief, a temporary injunction is allowed on the giving of an undertaking as required by statute and subsequently the parties submit the issues of law and fact in the case to arbitrators selected by themselves, and bind themselves to abide the award (it being in no way made subject to the approval of the court) and the arbitrators make an award in pursuance of the submission that the plaintiff is not entitled to the relief asked in his petition, and award that he dismiss his action, and afterwards the action is so dismissed by consent of the parties and the injunction dissolved, such award is not a judicial determination that the injunction ought not to have been granted and will not support an action on the undertaking; nor will such dismissal by consent estop the defendants from making such defense."

Col., etc., Ry. Co. vs. Burke, 54 O. St. 98; 43 N. E. 282.

An effort may be made in the case at bar to distinguish this case from the authorities upon the ground that the stipulation contains what might be called a reservation of any rights which Mulvane had upon the bond. But in the case just cited it was attempted to dismiss the case without prejudice to the rights of the parties, but the court said:

"It is true that the dismissal was without prejudice, but this was not a controlling circumstance. It was not a part of the *ratio decidendi*. The reason of the decision is that considering the ground of this dismissal it was not determined thereby that the injunction ought not to have been granted."

And so, in the case at bar, having voluntarily interposed an obstacle which effectually prevented a court thereafter from "finally deciding that the temporary injunction ought not to have been granted," the condition for the breach became impossible of occurrence and the sureties have been released from all liability.

Also, see, in this connection sections 1638, 1639, 1640 and 1641, High on Injunctions, 3d ed., 2d vol.

Mr. Beach, in his more recent work on Injunctions, says (sec. 227):

"The liability of a surety on an injunction bond must be strictly construed, and he cannot be held liable beyond the precise terms of his undertaking. Thus, where the undertaking was that the sureties would pay defendants such damages 'as they may sustain by reason of the injunction if the court finally decides that the plaintiff was not entitled thereto,' it was held that a dismissal of the action and dissolution of the injunction for a cause arising subsequent to the commencement of the action and not related to the merits, was not a determination by the court that the plaintiff at the time the temporary injunction was granted 'was not entitled thereto' so as to render the sureties liable."

Citing, *Apollinaris Co. vs. Venable*, 136 N.Y. 46.

And a number of the other cases that we have already cited in this brief.

Again, in section 230, Mr. Beach states the law derived from the cases cited to be as follows:

"A surety's liability cannot be extended by the stipulation of the parties to the injunction suit, nor be changed by a statute which goes into effect subsequent to the execution of the bond by the surety. (Citing, *Mix vs. Vail, supra.*) The dismissal of the bill by agreement of parties or their counsel after preliminary injunction has issued, is not such a final determination that the injunction was wrongfully issued as fixes the liability of the sureties on the injunction; for otherwise their liability could be fixed by the agreement

of parties without their assent or even their knowledge instead of the decree of the court, as contemplated and tacitly understood when they signed the bond. This was the conclusion reached in Pennsylvania in 1888 on principle, where the question was then a novel one."

See, also, *Tozzle vs. Leacox*, 59 Ia. 42.

It is contended by the plaintiff in error not only that the stipulation estopped Mulvane from claiming damages, but that his suit was prematurely brought. In all these cases the distinction is clearly made between a voluntary dismissal of an injunction suit by the plaintiff, unaffected by any agreement with the defendant or any stipulation proceeding upon consideration to the defendant, and a state of facts such as exists here. It will be borne in mind that the Circuit Court of Appeals in finally determining this cause held that the effect of the stipulation was to prevent the obtaining of a review of the ruling and order of the court dissolving the injunction. It will also be remembered that by this stipulation Mulvane succeeded in obtaining the dismissal of the suit as to the two water companies, of which he was president and which he said were practically his own because he owned and controlled all the stock in them. He also accomplished an immediate

adjustment of his contract and agreement with Coffin & Stanton. He, of all parties to the suit, reaped the advantage and benefit of that stipulation.

As will be seen by reference to the case of *Tullock vs. Mulvane*, 61 Kan. 658, the court put language into our brief and into our mouths that we did not use—or intend; namely, that because complainants had voluntarily dismissed the injunction suit no damages could be recovered on the bond. If the complainants had voluntarily dismissed the injunction suit without connivance or benefit to the defendants, the position of the State court would be correct, for the simple reason that the defendant would be estopped to deny that final judgment had been rendered, the policy of the law being to hold such a dismissal equivalent to final judgment in the cause. That is the exception and the only exception to the rule which we here invoke.

The case of *Col. H. V. & T. Rwy. Co. vs. Burke*, 54 O. St. 98; 43 N. E. 282, will be found upon examination to be a very thorough and careful review of the authorities applicable to this principle of law, the reasoning of which brings this case clearly within the rule. For the convenience

of the court we quote from this decision. The court said:

"In all the cases with which we are familiar, or that have been cited in argument, the courts have required, as a necessary predicate in an action on the bond, a judicial determination of the merits of the case in favor of the defendant in the action in which the bond was given, either in a trial on the merits, or on a motion to dissolve the injunction, except those where the plaintiff dismisses his action without the consent of the defendant. In the excepted cases, for reasons just given, he is estopped from insisting on the terms of the bond, and in none others."

[After citing a large number of authorities, the court continued:]

"These cases, and many similar ones, all illustrate the principle heretofore stated — that no recovery can be had on a bond or undertaking, except in strict accordance with its terms. There must be a showing that it has been determined by the court that the injunction should not have been granted, and also that any agreement between the parties, subsequent to the allowance of the injunction, by which the action is dismissed and the injunction dissolved, is not sufficient in an action on the bond, where there has been no judicial determination that the injunction should not have been allowed."

See, also, *Cassem vs. Ernst*, 84 Ill. App. 70, wherein the court said:

"The words in an injunction bond that the surety is to 'pay the damages resulting to the obligee by reason of the issuing of the injunction

in case the same shall be dissolved,' mean a dissolution by order of court, either in a final decree upon a motion to dissolve or upon the complainant's failure to prosecute the suit, and not a dissolution by agreement of the parties upon a settlement of all or a part of the controversies involved."

The Supreme Court of Kansas also seeks to avoid the force of this point by the following statement appearing upon page 658 of 61 Kan. 285, of the record:

"Before the complainants voluntarily dismissed their bill for injunction, a hearing was had as to the rightfulness of granting it in the first instance. Upon that hearing an order dissolving the injunction was made."

This was the order made by Judge Caldwell at Little Rock, notwithstanding which the cause proceeded, pleadings were filed, and the case was making due progress. Nothing was to be assumed at the time the bond was given that the rightfulness of the order of Judge Caldwell would not be contested upon the final hearing of the cause and upon appeal duly taken to the United States Circuit Court of Appeals. The court therefore could not contend that the order dissolving the injunction made before the bond was given was tantamount to a dismissal of the case or

obviated the necessity of a final decree or prevented the ultimate determination of the cause by the United States Circuit Court of Appeals. But the court goes on further to say that while in chancery practice the rightfulness of all interlocutory orders come up for review again upon final hearing, yet, unless reversed or otherwise changed upon the final hearing, they become final decisions either as of the time when made or as of the time of review.

It is obvious that the court here got into a quagmire of contradictions. It does not state that the final hearing of the decree upon review relates back to the time of the making of the interlocutory order dissolving the injunction; but whether it does or not, the stipulation here was filed before there was a final hearing or an opportunity had for review, and as will be seen hereafter in this brief, the opinion of the Circuit Court of Appeals which was introduced as evidence in this cause, discloses the fact that by reason of this very stipulation the court was precluded from reviewing the rightfulness of the interlocutory order dissolving the injunction. Certainly, at no time or at no stage of the cause did the interlocutory order dissolving the injunction

become final by any adjudication of the court itself. In other words, the Supreme Court of Kansas bases its decision in holding that the condition of this liability happened upon two grounds, inconsistent with each other, and the existence of one of which necessarily rendered impossible the other. If the court found in the record anything upon which to support its assertion that there had been a final determination, it inevitably follows that the stipulation could not have had the effect asserted by the United States Circuit Court of Appeals. In brief, this proposition that the contingency upon which liability depended had never happened was avoided by the Supreme Court of Kansas and was not fairly considered or decided.

VI.

The Action on the Bond was Prematurely Brought.

By reference to the statement of the case, it will be seen that the decree in the Circuit Court was entered on the 26th day of September, 1892; that such decree dismissing the bill as to Joab Mulvane contained a declaration that the plaintiffs at once prayed an appeal from such decree and

that such appeal was allowed and a supersedeas bond fixed. It was admitted at the hearing by stipulation of fact included in the record, and referred to in the statement heretofore made, that such appeal was regularly taken and within time and supersedeas bond duly given, and that such appeal was pending and undetermined in the United States Circuit Court of Appeals at the time this suit was brought (p. 260).

Upon page 241 of the record the following assignment of error will be found, which was contained in the record in the Circuit Court of Appeals.

"1. The court erred in dissolving the temporary injunction theretofore granted against the defendant, Joab Mulvane."

And this was one of the questions presented to said court upon the appeal.

By reference to the injunction bond, it will be seen that the defendant surety obligated himself to pay all damages which they, the obligees, or either of them, "have already sustained or may at any time sustain, by reason of the granting or issuing of said restraining order, or the granting and issuing of said temporary injunction, if it shall be *finally decided* that said restraining order or

said temporary injunction ought not to have been granted" (p. 7). The question, therefore, to determine is at what particular stage or period of these proceedings can it be said to have been finally decided that the injunction against Joab Mulvane was wrongfully granted. We say that it was not finally decided until the appeal, which had been allowed by the Circuit Court entering the decree, had been passed upon and decided by the Circuit Court of Appeals to which it was referred. This question that the action was prematurely brought was presented to the trial court by objections to testimony, by the answer, by instructions duly requested, and by the motion for new trial (pp. 2, 11, 269, 277). The court gave the following remarkable instruction (p. 272):

"5. Where a suit is commenced and a temporary injunction granted and thereafter set aside, the party against whom the injunction is granted may recover upon the injunction bond given whatever actual damage he has sustained by reason of the wrongful issuance of the injunction, and the person against whom the injunction is granted may maintain an action upon the injunction bond for damage sustained at any time after the temporary injunction has been set aside or the injunction branch of the case abandoned by the plaintiff. He is not required to wait until the main action is terminated.

In this case, then, if you find from the evidence

that prior to the commencement of this suit a temporary injunction had been issued in the case in the Federal court and had been set aside or the injunction branch of the case abandoned by the plaintiffs in that suit, then the defendant or defendants against whom the injunction had been issued could maintain an action to recover the damages sustained by reason of the wrongful issuance of the injunction."

This is so clearly not the law, and it is so clearly beyond the province of the jury to determine a fact of this character, which is addressed wholly to the court upon undisputed facts as a conclusion of law, that we do not think we care to discuss the erroneous character of it at length.

This instruction is also erroneous as being a misstatement of the rules established by the Federal court in chancery proceedings. The rule is so well known that it needs no citation of authority, that all interlocutory orders and motions come up for review at final hearing and before final hearing it cannot be determined what the court's ultimate view shall be as to the rightfulness or wrongfulness of issuing a preliminary injunction order or of dissolving an injunction.

The review in the appellate court of a chancery cause is in essence a trial *de novo*, and the court may in such cause examine anew and reconsider

all the testimony which has been introduced and preserved. In finally determining the cause in the appellate court such court is in no respect bound by the decree of the Circuit Court, and if it should find after an examination of the entire record that the decree of the Circuit Court should be in any wise changed or modified or affected, the appellate court may make a decree in the cause, and cause it to be entered by the Circuit Court, which last decree becomes and is the final decree in the case. The decree made by the appellate court and thus directed to be entered is the final decree and may not thereafter be in any wise modified or affected by the Circuit Court.

This has been the universal interpretation of the effect of an appeal by this court. See among other cases:

Sibbald vs. U. S., 12 Pet. 488, 490.

Stewart vs. Salamon, 97 U. S. 361.

Southard vs. Russell, 16 How. 547.

Durant vs. Essex, 101 U. S. 555.

Kingsbury vs. Buckner, 134 U. S. 650.

Smelting Co. vs. Billings, 150 U. S. 31.

Gaines vs. Rugg, 148 U. S. 228.

The whole question came up for discussion in the recent case of *The Bissell Carpet Sweeper Co. vs. Goshen Carpet Sweeper Co.*, 19 C. C. A. 25, Circuit Court of Appeals, Sixth Circuit.

Also, see, *Metcalf vs. City of Watertown*, 16 C. C. A. 37, Seventh Circuit.

It is clear, then, that as to a cause in chancery it cannot be said to be finally decided and determined when appealed until the record in the case has been finally examined by the appellate tribunal and the whole matter reviewed and decided. By reference to Daniell's Chancery Practice and Procedure, it will be seen that bills of review or for rehearing in the Court of Chancery are put in the same category as appeals to the House of Lords. In their essence they are the same. They involve of necessity a retrial, and, as is said again and again in the opinions to which this court's attention has just been directed, an examination of the *merits* of the cause.

If there be any court, therefore, after the case has been tried in the Circuit Court, that has a right to re-examine the merits and to finally, as was said by the court, "determine and decide," then the case cannot be said to be "finally decided" until the decision of such appellate tri-

bunal has been made and entered. As was said by Judge Lurton in the Bissell Carpet Sweeper Co. case, the affirmance of the decree of the lower court is an adoption of such decree by the appellate court; but it is the decree of the appellate court, nevertheless, and it may not be altered or affected in any respect by the trial court after it has been directed to be entered. Speaking of the effect of the decision, Judge Lurton, in the Bissell Carpet Sweeper Co., says:

"If that decision [namely, the decision in the appellate court] was an affirmance of the decree below, *that decree becomes the decree of this court*, and is no longer open to review, rehearing or modification, for it has become the settled law of the case."

And again:

"If no error was found in the decree appealed from, there was a direction that the decree be affirmed. The effect of such an affirmance was to adopt the decree below as its decree, which from thence was no longer subject to alteration. If there was not a concurrence with the decree appealed from, the court did not content itself with merely reversing it, but clearly directed the lower court as to the decree which should be entered; and, if it was so possessed of the whole record as to enable it to see and adjudge that the complainant had no equity in his suit, the court would not only direct a reversal of the decree appealed from, but terminate the litigation by a direction that the bill should be dismissed."

See, also:

Morgan's, etc., Co. vs. Railway Co., 32 Fed. 525.

Morrin vs. Lawler, 91 Fed. 693.

What, then, was the jurisdiction of the Circuit Court of Appeals in this case? It had jurisdiction not to review alone, although incidentally it might review the decision of the lower court, but it had jurisdiction to examine and to decide, to make an entirely new decree and one that had never been contemplated by the parties or the court below, and to order that decree to be entered in the cause, and when so entered it was the first and only final decree upon the subject under contention. Therefore, we contend that, having appealed the entire cause as it stood to the Circuit Court of Appeals and by appropriate assignment of error presented the question of the rightfulness of the order dissolving the temporary injunction, until that court had passed upon the question of the rightfulness of such order, it was not and could not be finally decided whether or not such interlocutory injunction was rightfully granted or was wrongfully dissolved.

This subject was discussed and learnedly con-

sidered in the case of *Cohn vs. Lehman* 93 M
574, presenting a case almost exactly parallel
the case at bar. See, also, the case of *Hamill*
vs. The State, 32 Md. 348, in which the view
which we contend for were upheld and the su
instituted under like circumstances to this w
held to have been prematurely brought.

In the Missouri case, the defendant in the su
on the bond had averred by his plea the prosecu
tion of an appeal from the decree of dismiss
entered by the Supreme Court of the Unite
States, but the trial court had held that inasmuc
as a supersedeas bond had not been given th
judgment in the United States Circuit Court wa
final and that an action had accrued upon th
injunction bond. The contrary was held by th
Supreme Court of Missouri. The court said:

"It follows in this case, then, that, althoug
the injunction was dissolved in the District Cour
before final hearing, yet no right of action accrue
on the bond, or could accrue, until a final decre
had been rendered in the cause in which such
bond was given. A final decree was rendered i
said District Court in said cause, dismissing plain
tiff's bill, but by the appeal to the Supreme Court
such decree, as well as the whole cause, was
removed to the Supreme Court for review, and
its operation as a final decree was suspended, and
so remained suspended at the time of the institu
tion of this suit, and by the action of the Supreme

Court, whenever action shall be taken on such appeal, the decree of said District Court may be reversed, the plaintiff's bill be reinstated, the order dissolving the injunction set aside, and a perpetual injunction granted, and a breach of the condition of the bond become impossible. If, therefore, a valid appeal has been taken to the Supreme Court of the United States in said equity suit, and such appeal was pending in said court at the time this suit was instituted, plaintiff had no cause of action on the bond."

See, also:

Howard vs. Park, 59 How. Pr. 344.

Musgrave vs. Sherwood, 76 N. Y. 194.

Gray vs. Veirs, 33 Md. 159.

Penny vs. Holberg, 53 Miss. 567.

Murfree on Official Bonds, sec. 391.

The last mentioned authority, in section 392, states the law, with appropriate citation of authority, to be that the statute of limitations does not begin to run in favor of a surety upon an injunction bond during the pendency of the appeal.

See, also, generally, sec. 1648, *et seq.*, High on Injunctions.

But it may be contended that by the opinion of the Circuit Court of Appeals, it appears that the Circuit Court of Appeals has said that complainants in the original suit could not have a review of the rightfulness of this interlocutory order,

because they had stipulated to dismiss certain of the defendants and to ask for damages for the breach of their contract as they might. Granting this to be true, when can this be said to have been finally determined? Had the defendants any right to anticipate such determination until the Circuit Court of Appeals had so decided? Could the State court, before the Circuit Court of Appeals was even addressed upon the subject, or had pronounced its opinion, substitute its judgment and determination for that of the only tribunal entitled to finally pronounce upon the subject? And was the State court, as it has done in its instruction, authorized to submit to the jury the question whether Mr. Mulvane might so substitute his judgment before the determination of the Circuit Court of Appeals had been reached?

The State court accepted jurisdiction of this case on the bond, and might, under its rules, have tried and determined it long before a decision could have been reached in the Circuit Court of Appeals. In so doing it assumed a jurisdiction to pass upon and determine the very questions that were involved in the appeal and assigned as errors to be heard in the Circuit Court of Appeals, and assumed thereby to pass upon the effect of a

record in a case that was not before it and of which it never had a vestige of jurisdiction, and at a time when all jurisdiction connected with the case was lodged by virtue of this appeal with the Circuit Court of Appeals. The question and the important question that was in the case, was whether Judge Caldwell had jurisdiction at Little Rock, the United States Circuit Court for the District of Kansas being in session and Judge Foster being within the district, to hear and determine the motion that was made to dissolve the injunction. Such question was fairly presented to the Circuit Court of Appeals and might have been determined by that court. How could the State court entertain jurisdiction of this case on the bond without determining that question, and had it any power, right or authority to determine that, by virtue of the stipulations entered into, the Circuit Court of Appeals was deprived from affording a review of that question? Suppose the Circuit Court of Appeals had taken the contrary view and had held in terms that Judge Caldwell had no jurisdiction to make such an order, and that the order originally made by Judge Foster granting the temporary injunction still stood unaffected, would or would not such determination abate the

suit commenced in the State court? Or could the State court reverse that decision or, as it has done in this instance, refer its determination to the arbitrament of a petit jury?

Again, it will be observed that the case was not dismissed against Joab Mulvane, but by consent of all the parties to the cause the bill was retained as against Mulvane, with the understanding that the cause should be tried and that damages should be assessed by the court in lieu of a decree of specific performance as for a breach of said contract, if the court was of opinion that the appellants were originally entitled to specific performance. The time for taking of proof was apportioned between the complainants and the defendant Mulvane, the cause was continued over a number of terms of court by mutual agreement and a large amount of testimony was taken upon the issue of damages and upon the merits of the cause.

Now, it cannot be contended, with the record in this condition, Mulvane was in any position to institute an action for damages against Tullock upon the injunction bond. If the effect of the stipulation was as contended by his counsel, any

right which Mulvane had must have been contingent in its character, because, if the complainants should be ultimately successful in the recovery of damages against him, it would conclusively establish not only that he was entitled to nothing upon the injunction bond, but that as against him the injunction was rightfully obtained in the first instance. The controversy between Mulvane and the complainants was by no means terminated. The same elements of complaint and defense were preserved between them. The decree which was rendered by the Circuit Court was in favor of Mulvane for costs. That represented at the time the entire amount of his recovery against the complainants, and it was all that needed to be superseded. A supersedeas bond was given, as shown by the admission of facts, and therefore this entire controversy between the complainants and the defendant Mulvane was transferred to the United States Circuit Court of Appeals. That tribunal unquestionably had the power to reverse this judgment and to direct a decree in favor of the complainants for the damages shown by the proof. This case is not unlike that of *Thompson*

vs. McNair, 64 N. C. 448, the syllabus of which is as follows:

"An injunction obtained by plaintiff at law, in order to preserve property in litigation until the determination of the suit at law, having been dissolved, held that no reference to ascertain damages sustained by the defendant because of such injunction or other proceeding upon the injunction bond could be had until after the determination of the suit at law."

The court in this connection (p. 448), says:

"It cannot be known judicially that the injunction was wrongfully sued out until the action at law is disposed of. Suppose the defendant should be allowed to have judgment in this proceeding, on the ground that there was not probable cause, and afterwards the action at law be decided in favor of the plaintiff, he would be entitled to recover back the very damages that the defendant now seeks to recover, and the record of the court would be inconsistent and contradictory.

An injunction in aid of an action at law, to preserve the property pending the suit, is of rare occurrence. The fact that, in order to make a report, the commissioner in equity felt constrained to pass upon the legal title in anticipation of the judgment in the suit at law, presents a legal absurdity, which the courts avoid in judicial proceedings. An analogy may be found in the action for malicious prosecution. It is settled that the action cannot be maintained until the indictment is finally disposed of, either by an acquittal or a *nol. pros.* Otherwise, the defendant might recover damages and be afterwards convicted of the offense, and thus the record be made to contradict itself."

We therefore conclude upon this head:

First. That no action could lie upon this bond pending the appeal to the United States Circuit Court of Appeals.

Second. That the State court during such appeal had no power or authority to construe the stipulation of October 7, 1890, or to determine its effect upon the jurisdiction of the United States Circuit Court of Appeals to review the case presented to it.

Third. That the bill having been retained by consent with the understanding that the case should be tried and damages assessed by the court in lieu of a decree for specific performance, and an appeal having been taken, Mulvane was in no position, pending the appeal, to bring a counter action for damages against the complainant.

Fourth. That therefore, under no aspect of this case, can it be said that there was a final decision or that a right of action accrued upon this bond until the mandate from the Court of Appeals had been filed.

In conclusion, we respectfully submit that the judgment of the Supreme Court of Kansas should be reversed with instructions to direct the District Court of Shawnee County to sustain the plea that

the action was prematurely brought; and further, that the rule announced by this court governing the measure of liability upon Federal injunction bonds should be sustained and enforced in this case.

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Attorneys for Plaintiff in Error.

No. 275.

Reply Brief of Plaintiff in Error.

Filed April 23, 1901.

In the Supreme Court

OF THE

UNITED STATES.

October Term, 1900.

A. J. Tullock,	Plaintiff in Error,	No. 275.
vs.		
Joab Mulvane,	Defendant in Error.	

REPLY BRIEF OF PLAINTIFF IN ERROR.

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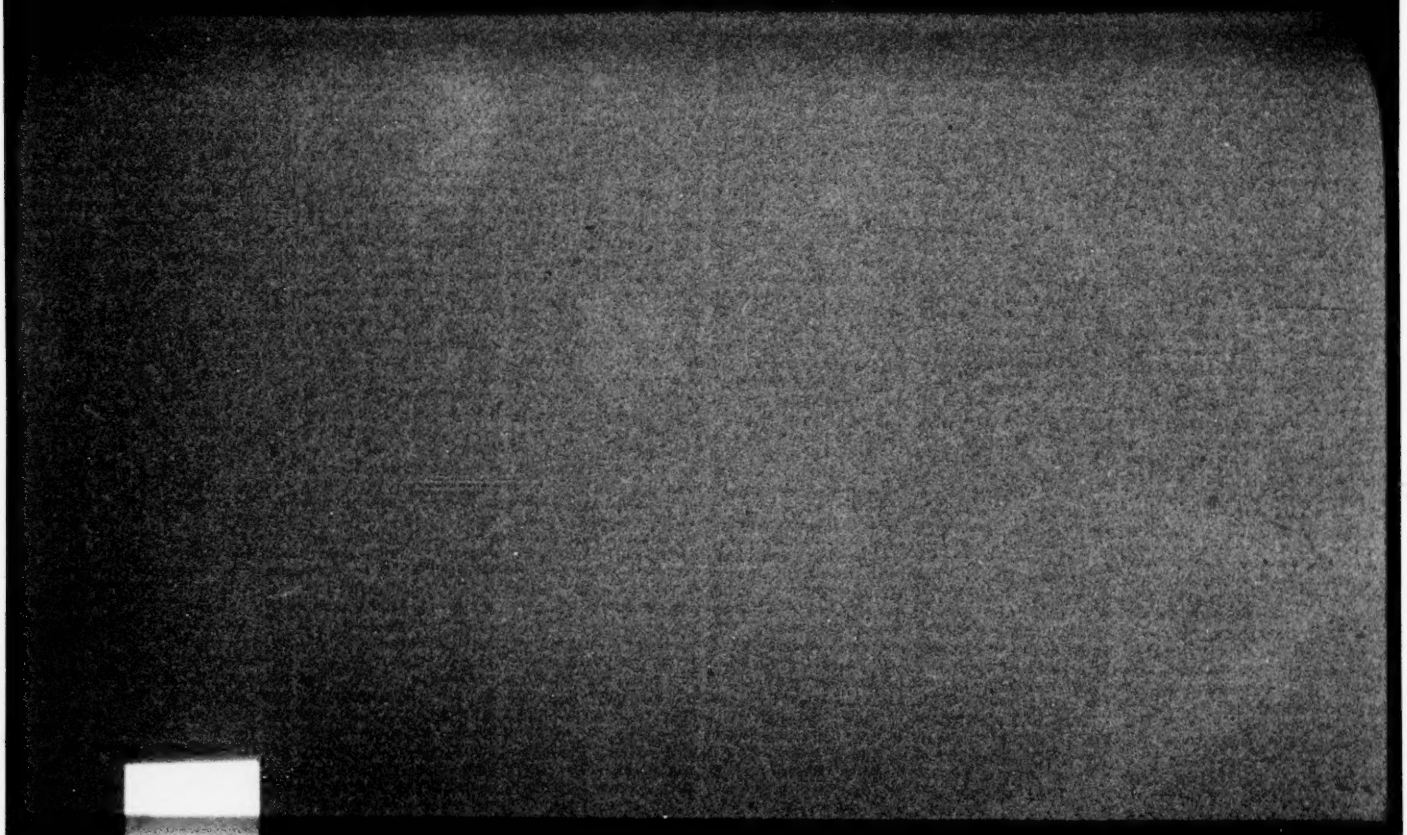

In the Supreme Court

OF THE

UNITED STATES.

October Term, 1900.

A. J. Tullock, Plaintiff in Error,
vs.
Joab Mulvane, Defendant in Error.
No. 275.

REPLY BRIEF OF PLAINTIFF IN ERROR.

An examination of the brief and argument filed on behalf of the defendant in error shows that it is confined to an attempt to avoid a determination of the merits of this controversy. Substantially no effort in the way of argument is put forth to sustain the rightfulness of the judgment complained of.

It seems to us that the learned counsel entirely misconceive the essential nature of this case and

their objection to a consideration of this writ of error proceeds from a fundamentally erroneous theory. We perhaps have already sufficiently covered the points in our brief, but we desire to briefly state certain propositions which we believe are controlling and which entitle us to a review of the merits, with a citation of the authorities in their support:

The suit being founded upon a bond exacted by the Federal court, necessarily involves a Federal question.

This proposition finds its practical and conclusive support from the fact that this court in at least two cases has entertained and decided on their merits writs of error to the State courts in suits upon Federal injunction bonds: *Bein vs. Heath*, 12 How. 168, and *Meyers vs. Block*, 120 U. S. 206.

The jurisdiction of the United States Circuit Courts to entertain original suits upon such obligations irrespective of the citizenship of the parties has been recognized in a large number of cases and has never been questioned.

Leslie vs. Brown, 32 C. C. A. 556, 90 Fed. 171.

See, also, pp. 37, 38, 39 and 40 of our original brief, wherein the authorities are collated.

In *Nashville C. & St. L. Rwy. Co. vs. Taylor*, 86 Fed. 168, the court, after a thorough examination of the authorities, digests this proposition in one of the paragraphs of the syllabus as follows:

"In that class of cases in which a federal question is involved and on which jurisdiction of the courts of the United States depends, the character of the question is the same whether the jurisdiction exercised is appellate, original, or by removal; the jurisdiction in either form depending upon the constitutional grant of power."

As throwing more or less light upon this question, reference may also be made to the following additional cases to those contained in our brief:

Clements vs. Berry, 11 How. 398.

Buck vs. Colbath, 3 Wall. 334.

Factors' & Traders' Ins. Co. vs. Murphy, 111 U. S. 738.

New Orleans, etc., R. R. Co. vs. Delamore, 114 U. S. 501.

Crescent Live Stock Co. vs. Butchers' Union, 120 U. S. 141.

Etheridge vs. Sperry, 139 U. S. 266.

Texas & P. R. Co. vs. Cox, 145 U. S. 593.

Sonnentheil vs. Christian, etc., Brewing Co., 172 U. S. 401.

Pittsburg, etc., Rwy. Co. vs. Long Island Loan & Trust Co., Id. 493.

The test of a Federal question is not the ruling of the court. The significance of an adverse ruling lies solely in the fact that thereby the aggrieved party is entitled to present the Federal question for review by this court.

Furman vs. Nichol, 8 Wall. 44.

The jurisdiction of this court to review on writ of error the judgments of the State courts in this class of cases is broader than the original jurisdiction of the Circuit Courts of the United States.

See, *Nashville, etc., Ryy. Co. vs. Taylor*, 86 Fed. 175, which fully discusses this proposition.

The rights of the parties in this case are not to be determined by principles of general law, but are governed and controlled by the decisions of this court.

This is a question which we have fully and carefully elaborated in our principal brief. It seems to us that the brief for defendant in error begs the whole question by assuming, without argument or citation of authorities for its support, that the bond sued upon is to be treated entirely as an independent contract. This we have shown

from prior decisions of this court to be untenable.

See, particularly, *Russell vs. Farley*, 105 U. S. 433.

It cannot be successfully denied that Tullock had a right to make this bond and that he did so in view of the law as declared by this court governing such bonds and the liabilities which sureties thereby assume.

Olcott vs. Supervisors, 16 Wall. 690.

Burgess vs. Seligman, 107 U. S. 20.

The implication of law is that in executing the bond the surety did it in the view which the established practice in courts of equity attach to such proceedings. Inasmuch as a writ of error will issue from this court to review the judgment of the State court in cases of this character, the decisions of this court are paramount authority and binding upon the State tribunal.

Counsel curiously misconceive the purpose of our argument wherein, on page 27 of their brief, they concede the power of the Circuit Court of the United States to modify or entirely remit liability upon the undertaking, but urge that nothing of that kind was done in the case at bar. If it be granted that such power exists, then it inevitably follows that the undertaking cannot be

treated as an absolute and independent contract, but must be regarded as auxiliary and incidental to the main cause; and this was the entire purpose of the suggestion of such power which we made in our brief.

The record herein shows by clear and necessary intendment that a Federal question was directly involved and that the State court could not have rendered the judgment which it did without deciding it; that its decision was opposed to the decisions of this court upon the same question and denied to the plaintiff in error an immunity and protection which he claimed in a timely and proper way under the laws of the United States.

Under the record produced here there can be no serious claim that the questions which we seek to review in this court were not fully and fairly presented to both the trial and Supreme Courts of Kansas and were there decided adversely to the contentions of the plaintiff in error; that he claimed in the court below immunity from the measure of damages enforced upon this undertaking by the State court; and demanded that the Federal law be applied to the questions involved in the case; and that his claim was denied. This was

not only interposed by the objections to testimony and the amendment to the answer which are referred to in the brief for defendant in error, but in addition, was directly presented by the requests for instructions duly prayed by the defendant upon the trial of the action.

See, pp. 269 *et seq.* of the record.

The opinion itself is to be treated as a part of the record in this case and it may be examined in order to ascertain the fact whether these questions were so presented.

Egan vs. Hart, 165 U. S. 188.

This opinion shows clearly that the concrete questions which are urged here were presented and considered and decided adversely to the contention of the plaintiff in error. It is difficult to conceive what more could be required from the plaintiff in error in a fair effort to invoke the protection and immunity against both the measure of damages and the claim of liability on the bond which were enforced against him by the court below.

The State court did not give due effect to the order of the United States Court in requiring and approving the injunction bond, and denied to the

defendant a protection and immunity thereunder which he invoked.

This case comes clearly within the rule of *Green Bay, etc., Co. vs. Patten Paper Co.*, 172 U. S. 58, and which is referred to in *Dewey vs. Des Moines*, 173 Id. 199.

See, also, *Kaukauna Water, etc., Co. vs. Green Bay, etc., Co.*, 142 U. S. 254.

Hagar vs. California, 154 U. S. 639.

Sayward vs. Denny, 158 U. S. 180.

M. K. & T. Ry. Co. vs. Haber, 169 U. S. 613.

Railroad Co. vs. Iowa Homestead Co., 123 U. S. 552.

The Bridge Co. vs. The Hoboken Co., 1 Wall. 116.

C. B. & Q. Rld. Co. vs. Chicago, 166 U. S. 226.

The whole point is stated by this court in its syllabus in *Furman vs. Nichol*, 8 Wall. 44, as follows:

"It need not appear that the State court erred in its judgment. It is sufficient to confer jurisdiction that the question was in the case, was decided adversely to the plaintiff in error, and that the court was induced by it to make the judgment which it did."

Also, following this decision the Federal court in the case of *Nashville C. & St. L. Rwy. Co. vs. Taylor*, 86 Fed. 168, held:

"There is a clear distinction between the existence of a Federal question, for the purpose of jurisdiction, and the actual decision of that question on its merits. The jurisdiction of the Federal courts does not depend upon the validity of the claim set up under the Constitution or laws of the United States, but upon the fact that the claim involves a real and substantial dispute or controversy in the suit."

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No. 275.
Def. of Williams & Loomis
FILED
APR 15 1901
JAMES H. MCKENNEY
Clerk
D. C.

No. 275.

Filed April 15, 1901.

In the Supreme Court

OF THE

United States.

A. J. Tullock, Plaintiff in Error,
vs.
Joab Mulvane.

In Error to the Supreme Court of the State of Kansas.

Brief and Argument for Defendant in Error.

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Crane & Co., Topeka.

No. 275.

In the Supreme Court

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United States.

A. J. Tullock, Plaintiff in Error,
vs.
Joab Mulvane.

Brief and Argument for Defendant in Error.

As COUNSEL for plaintiff in error state in their brief, this is a suit brought upon an injunction bond given in a Federal court. The case was brought in the District Court of Shawnee county, Kansas. Judgment was rendered in favor of plaintiff for $25,000. Of this amount the testimony shows that $16,000 was for attorneys' fees and the balance for expenses and interest, including interest on moneys tied up by the injunction. The judgment of the District Court was affirmed by the Supreme Court of the

State, and the case thereupon carried by writ of error to this court.

The opinion of the Kansas Supreme Court may be found in 61 Kans., p. 650. Also on page 280 of the record.

A full statement of the facts involved in this case, from Mr. Mulvane's standpoint, will be found on pages 1 to 17 of the brief filed in the Supreme Court of Kansas, which has been attached to and made a part of this brief.

Our principal contention in this case is, that the questions presented here for review were not properly saved by the record; but that if they were, they are questions of general law which will not be considered by this court on a writ of error directed to the Supreme Court of a State.

Before proceeding to a consideration of this subject we wish to call to the attention of the court all the points in the record with respect to which it was claimed in the State courts that a Federal question was involved.

In the amended answer found on page 245 of the record, defendant alleges that attorneys' fees cannot be recovered on the bond as damages, for the reason that the bond was given in the Federal court and attorneys' fees are not recognized as a proper element of damages upon injunction bonds in that court. We give herewith the statement of counsel asking leave to make the amendment, and the amendment as made:

"Mr. Smith: If the court please, we now desire leave to

amend our answer in respect to one fact, and that is simply to meet this question of attorneys' fees. We desire to state that this point was raised in the Federal court, and that under the law of the Federal courts attorneys' fees are not a proper measure of damages. I am very frank to tell the reason I do this. I want the record to show that there is a Federal question involved in this case. It will appear in the record at large, but it will more clearly appear, of course, if we put it in our answer." . . . "THE COURT: The amendment will be allowed."

"AMENDMENT TO ANSWER.

"This defendant further answering said petition of the plaintiff as amended, says, that under the laws of the United States, and as enforced and existing in the Federal courts at the time of the execution of said bond, attorneys' fees could not be allowed as damages in a suit brought upon an injunction bond given in the Federal court for a breach of said bond; that said bond was executed by this defendant in contemplation of and in reliance upon the law so as aforesaid, regulating the liability of sureties upon bonds in the Federal courts; that ever since the execution of said bond the law of the Federal courts regarding said measure of damages and denying the right to recover attorneys' fees as a part thereof has remained the same.

"By reason whereof, this defendant submits that the said plaintiff ought not to have and recover anything in this action for or on account of attorneys' fees as a measure of his damages in the event he is entitled to recover herein."

On page 16 of the record counsel for Tullock made the following objection to testimony covering attorneys' fees:

"The defendant further objects because it appears that this bond was given in a proceeding in the Federal court, and under the law of the United States governing the liability of parties for damages on bonds or in such proceedings in Federal courts attorneys' fees are not included."

Other objections to similar testimony were offered, but they all referred back to and were based upon the objection just quoted. These additional objections may be found on pages 18 and 19 of the record.

In the opinion of the Supreme Court of Kansas (pp. 280–282 of the record), it appears that the contention of Mr. Tullock with respect to the allowance of attorneys' fees is met and decided adversely to him. The language of the court is as follows (p. 282):

"The contentions in behalf of the plaintiff in error, stated in the order made by him, are, first, that attorneys' fees are not allowable as damages in a suit on an injunction bond given in a case in the Federal court, but that in the event of a dissolution of the injunction and the consequent occurrence of a liability upon the bond the court granting the injunction awards damages upon the bond in a proceeding ancillary to the injunction case. This was the main contention of Tullock, the surety on the bond, when the case was here before. It was fully considered then and held to be unfounded. No additional arguments have been advanced or additional authorities cited influencing us to take a different view of the question."

Nowhere else in the record will be found a statement wherein it appears that counsel were endeavoring to raise a Federal question, either by pleadings, objections to testimony, instructions, assignments of error, or otherwise.

Errors Complained Of.

The specification of errors set forth in the brief of plaintiff in error can all be grouped under three general heads, as follows: 1st. Errors with respect to the allowance of attorneys' fees as damages. 2d. Errors assigned upon the theory that the action was prematurely brought. 3d. Error in refusing to hold that Mr. Tullock, a surety, could not be held liable inasmuch as the injunction proceedings did not go to a final hearing in the courts, but were dismissed by the complainant upon a dissolution of the temporary injunction.

For convenience we will restate these propositions, giving at the same time the various points embraced under these general heads:

1. Error in allowing any attorneys' fees as an element of damages. (Specification 3, p. 17.)

(*a*) If allowed at all, it is claimed that attorneys' fees should only have been allowed for services rendered in procuring a dissolution of the temporary injunction. None should have been allowed for services rendered in the endeavor to prevent the granting of a temporary injunction. (Specification 4, p. 18.)

(*b*) It is claimed that there was a failure to separate fees for services rendered in connection with the injunc-

tion proceedings from those rendered generally in the case. (Specification 5, par. 1, p. 19.)

(*c*) It is claimed that there was a failure to separate the fees for services rendered Mulvane, from those rendered the other defendants. (Specification 5, par. 2, p. 19.)

(*d*) It is claimed that Mulvane was erroneously allowed damages for fees paid on account of services rendered other defendants in the case. (Specification 5, par. 3, p. 19.)

(*e*) It is claimed that the court erred in permitting proof and charge for payment of more than one attorney's fee to more than one attorney or firm of attorneys.

2. Error is asserted in that the court refused to hold that the action was prematurely brought. (Specification 8, p. 21.)

(*a*) It is also claimed that there was error in admitting as evidence of the fact that there was a final determination of the injunction proceedings, and that the action was not prematurely brought, the stipulation found on page 175 of the record, dismissing the injunction branch of the case. (Specification 6, p. 20.)

(*b*) It is claimed that there was error in instructing the jury that suit might be brought on the injunction bond upon the dismissal or abandonment of the injunction branch of the case, without waiting for the termination of the main action. (Specification 9, p. 21.)

3. Error is asserted in that the court refused to hold

that Mr. Tullock, a surety, could not be held liable inasmuch as the injunction proceedings did not go to a final hearing in the courts, but were dismissed by the complainant after the dissolution of the temporary injunction. (Specification 7, p. 20.)

It will be observed from the foregoing and a careful inspection of the specifications of error, that no claim is made to the effect that the bond was not legal or was not binding upon the defendant, or that the court had no jurisdiction of the cause of action. The jurisdiction of the State court was conceded, and the only questions now presented for review are questions of general law passed upon by a State court in the exercise of its lawful powers.

Counsel devote considerable space in their brief to the proposition that the United States Circuit Court could have entertained original jurisdiction of this cause on the ground that a Federal question was involved; and the State Supreme Court is criticised for intimating that the Federal courts could not entertain jurisdiction of a suit upon the bond, inasmuch as the plaintiff and one of the defendants were citizens of the same State.

Be it as it may, with respect to the jurisdiction of the Federal court, it is certain that the State court had jurisdiction, and it does not follow from the fact that there may have been a Federal question in the case sufficient to give the U. S. Circuit Court original jurisdiction, that

there is now a Federal question involved in the record which will be reviewed by this court.

There are numerous cases, involving more than $5,000, which may be brought originally in the United States Circuit Court because of a Federal question involved, but which, if brought in the State court, could not be appealed to the Supreme Court of the United States.

Let us now take up the various specifications of error, determine whether they present any questions for review in this court; if so, whether the right to present them has been properly preserved; and if both questions should be answered in the affirmative, whether there is any reason for reversing the judgment of the State court.

I.

The Question as to whether Attorneys' Fees are a Proper Element of Damages in a Suit upon an Injunction Bond given in a Proceeding in the Federal Court, is a Question of General Law which a State Court has the right to finally Determine. Its Ruling thereon will not be Disturbed by this Court.

Section 709 of the Revised Statutes (section 25 of the Judiciary Act), providing for the review of judgments and decrees of State courts on writs of error, reads as follows:

"A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be

had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against the validity, or where is drawn in question the validity, of a statute of, or an authority exercised under, any State on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of their validity; or where any title, right, privilege or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity, specially set apart or claimed by either party, under such Constitution, treaty, statute, commission or authority,— may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error. . . ."

Plaintiff in error has failed to specify upon which clause of this section he relies for a reversal of the judgment of the State court. It is difficult to perceive how any of the errors alleged by him can come within the terms of the foregoing statute.

Counsel have labored very earnestly, however, to support the proposition that the measure of defendant's liability upon the injunction bond in question, is to be determined exclusively in accordance with the decisions of the Supreme Court of the United States; that inasmuch as the bond was given in a case pending in the United States court, there should be imported into the bond, and made a part of it, the decisions of the Supreme Court of the United States with respect to the measure of damages upon injunction bonds, in suits pending in the Federal courts.

We will concede for the sake of argument, that the powers of a United States court of equity with respect to compelling the giving of a bond as a condition of issuing an injunction, is as claimed by counsel, and that in the case of *Wescott & Hanson v. Mulvane*, the court could have granted the injunction without requiring a bond; that the court could have imposed such terms as it saw fit, as a condition precedent to the granting of the injunction. As a matter of fact, the court exercised its discretion, and upon the allowance of the temporary injunction provided for an injunction bond to protect the defendants. (See page 123 of Record.) After the order granting the injunction and providing for an injunction bond was made, the complainant obtained leave to deposit cash in lieu of a bond. (See page 124 of Record.) Thereafter leave was obtained by plaintiff to withdraw the cash deposit and to give a bond as originally contemplated by the court. (See pages 168–171 of Record.) The bond so given is the one sued on in this case.

There is no question but what the court had the power to demand the giving of this bond, that it was executed in accordance with the order of the court, and that it was one which could be sued upon in the State courts.

Now, it must be conceded that the construction to be placed upon the bond, and the measure of liability under it, must be determined in accordance with established rules of law. There are only two classes of law applicable

thereto: written or statutory law; unwritten or common law. As to the allowance of attorneys' fees, there is no written or statutory law upon the subject. The only law by which the question can be determined is the unwritten or common law. It is well known that the United States has no common law.

In the case of *Wheaton & Donaldson v. Peters & Griggs*, 8 Peters, 658, it was held as follows:

"It is clear there can be no common law of the United States. The Federal Government is composed of twenty-four sovereign and independent States, each of which may have its local usages, customs and common law. There is no principle which pervades the Union, and has the authority of law, that is not embodied in the Constitution or laws of the Union. The common law could be made a part of our Federal system only by legislative adoption.

"*When, therefore, a common-law right is asserted, we must look to the State in which the controversy originated.*"

The bond in question was given in the State of Kansas, and was to be performed there. The common law governing its construction, therefore, must necessarily be the common law of Kansas.

But whether the common law of the State, or the principles of common law generally, are to govern, the courts of the State, in actions pending before them, are clothed with full power to finally determine what the law is.

When the Federal court caused a bond to be executed which could be enforced in a State tribunal, it gave life to an obligation subject to the remedies of the court in

which suit might be brought, and requiring a construction conformable to the laws of the State where executed and to be performed.

Counsel argue that the construction of the bond in question should be determined exclusively by the decisions of this court. We claim that the obligations of the bond must be determined in accordance with the principles of the common law, and that the Supreme Court of the State is vested with absolute and final power to determine what the common law is.

The measure of damages upon an injunction bond is, in the absence of a statute governing the matter, a question of general law, and this court has decided, time and again, that it will not review the decisions of a State court upon questions of that sort.

In *Thorrington v. Smith*, 8 Wall. 1, this court reversing a judgment of the Circuit Court of the United States in Alabama, held that a contract for the payment of money in Confederate currency was not unlawful. Like decisions have often been made in later cases brought here from the Circuit Courts of the United States. *Planters' Bank v. Union Bank*, 16 Wall. 483, 497; *Confederate Note Case*, 19 Wall. 548; *Wilmington & Weldon Railroad v. King*, 91 U. S. 3; *Cook v. Lillo*, 103 U. S. 792. Yet in *Bethel v. Demaret*, 10 Wall. 537, where a suit on a mortgage to secure the payment of promissory notes given for a loan of Confederate currency had been dismissed by the

Supreme Court of Louisiana, on the ground that the notes and mortgage were nullities, because the Confederate currency, which constituted the consideration, was illegal by *the general law of the State*, this court dismissed the writ of error, holding that the authority conferred by a State on its Supreme Court to hear and determine cases, is not the kind of authority referred to in the 25th section of the Judiciary Act, which gives this court a right to review the decisions of the highest State court, where is drawn in question the validity of a statute of, *or an authority exercised under any State*, on the ground of their being repugnant to the Constitution, etc.; . . . and the decision is in favor of such validity. This court also held in that case that the decision of a State court which simply held that promissory notes, given for the loan of "Confederate currency" together with a mortgage to secure the notes, were nullities, on the ground that the consideration was illegal, according to the law of the State, at the time the contract was entered into, is not a decision repugnant to the Constitution.

In the case of *Delmas v. Insurance Company*, 14 Wall. 661, this court held that "On a writ of error to a State court, this court cannot revise a decision founded on the ground that a contract is void on the general principles of public policy or morality, when that is the only ground on which the contract is held to be void." In the course of the

opinion in that case, Mr. Justice MILLER used the following language:

"When a decision on that point, whether holding such contract valid or void, is made upon the general principles by which courts determine whether a consideration is good or bad on principles of public policy, the decision is one we are not authorized to review. *Like many other questions of the same character, the Federal courts and the State courts, each within their own spheres, deciding on their own judgment, are not amenable to each other.*"

In the case of *United States v. Thompson et al.*, 93 U. S. 586, the United States presented for allowance, in insolvency proceedings against McFreely and Hopper, a claim in its favor, and asked that it be given preference over other creditors, on account of the priority given to debts due the United States by the act of March 3, 1797. The insolvency proceedings were pending in the Circuit Court of Queen Anne's county, Md. That court held that the claim of the United States had been paid, and decreed accordingly. The decree was affirmed by the Court of Appeals of Maryland. A writ of error was sued out to this court, but was dismissed on the ground that the decision of the State court was based upon *principles of general law* and would not be reviewed by this court. It was stated in the opinion that this court had no power to review decisions of the State courts upon questions of general law.

It will be noted that in the case last cited, the Federal courts would have had undoubted jurisdiction of the claim

of the United States in a direct suit upon it against McFreely and Hopper. Furthermore, if the State court had found that the claim was a subsisting one against the estate of McFreely and Hopper but that the United States was not entitled to the preference over other creditors, given by act of Congress, this court would have entertained jurisdiction of the case, upon writ of error, for the purpose of reviewing a decision of the State court of such a character. But as the case was decided upon a point of general law, this court refused to entertain jurisdiction.

So in the case at bar, if the State court had held the injunction bond void, because of a want of power in the court to require it, this court would have entertained jurisdiction for the purpose of reviewing its decision. But as the case comes to this court on a question as to the measure of damages under the injunction bond, which is a question of general law pure and simple, the decision of the State court upon it is not open to reconsideration in this court.

In the case of *New York Life Ins. Co. v. Hendren*, 92 U. S. 286, it was sought to have this court review the judgment of the Supreme Court of Appeals of Virginia; the point in issue being, the effect, under the general public law, of a state of sectional civil war upon a contract of life insurance. The case was dismissed for want of jurisdiction, the court holding that it could not pass upon

principles of general law decided by the State courts. In the course of the opinion of Mr. Chief Justice WAITE, the following language was used:

"Our jurisdiction over the decisions of the State courts is limited. It is not derived from the citizenship of the parties, but from the questions involved and decided. It must appear in the record, or we cannot proceed. We act upon questions actually presented to the court below, not upon such as might have been presented or brought into the case, but were not.

"The case, therefore, having been presented to the court below for decision *upon principles of general law alone*, and it nowhere appearing that the Constitution, laws, treaties, or executive proclamations, of the United States were necessarily involved in the decision, we have no jurisdiction. We have often so decided. *Bethel v. Demaret*, 10 Wall. 537; *Delmas v. Insurance Co.*, 14 id. 666; *Tarver v. Keach*, 15 id. 67; *Rockhold v. Rockhold*, *supra*, p. 129."

See also:

Marrow v. Brinkley, 129 U. S. 178.
Sherman v. Grinnell, 144 U. S. 198.
New Orleans v. New Orleans Water Works Co., 142 U. S. 79.

But it may be urged that the cases cited are not in point, inasmuch as the bond in question was one given in a Federal court, and therefore the Supreme Court of the United States has inherent power to review all questions decided by the State court in a suit based upon such a bond. This is not the law. The Circuit Court of the United States may have original jurisdiction in cases of that nature, but this court can only review cases on writ of error to the State courts when the precise questions

presented to it come within the purview of section 25 of the Judiciary Act. Questions involving general principles of law are not covered by that section.

In the case of *Provident Savings Society v. Ford,* 114 U. S. 635, it was claimed that a question necessarily arose under the laws of the United States in a suit because it was brought upon a judgment rendered by a Federal court. This court held otherwise, and in the course of the opinion the following remarks were made upon the subject by Mr. Justice BRADLEY (p. 641):

"What is a judgment, but a security of record showing a debt due from one person to another? It is as much a mere security as a treasury note, or a bond of the United States. If A brings an action against B, trover or otherwise, for the withholding of such securities, it is not therefore a case arising under the laws of the United States, although the whole value of the securities depends upon the fact of their being the obligations of the United States. So if A have title to land by patent of the United States and brings an action against B for trespass or waste, committed by cutting timber, or by mining and carrying away precious ores, or the like, it is not therefore a case arising under the laws of the United States. It is simply the case of an ordinary right of property sought to be enforced. A suit on a judgment is nothing more, unless some question is raised in the case (as might be raised in any of the cases specified), distinctly involving the laws of the United States — such a question, for example, as was ineffectually attempted to be raised by the defendant in this case. If such a question were raised, then it is conceded it would be a case arising under the laws of the United States."

In the case of *Blackburn v. Portland Gold Mining Co.*,

175 U. S. 171, which was a contest between rival claimants of a mine under sections 2325 and 2326, Revised Statutes of the United States, it was held that the judgment of the Supreme Court of the State in such case could not be reviewed in this court simply because the parties were claiming rights under a Federal statute. A like ruling was made in the case of *Florida Central and Peninsular Railroad Co. v. Bell*, 176 U. S. 321.

In the case of *De Lamar's Mining Co. v. Nesbitt*, 177 U. S. 523, it was held that "The fact that in a State court plaintiff and defendant make adverse claims to a mining location under the mining laws of the United States (Rev. Stat., sec. 2325), does not of itself present a Federal question within the meaning of Rev. Stat., sec. 709."

See also,—

Shoshone Mining Co. v. Rutter, 177 U. S. 505.

Carothers v. Mayer, 164 U. S. 325.

In the case of *Montgomery v. Hernandez*, 12 Wheat. 129, suit was brought by Hernandez *et al.* in a State court of Louisiana, upon the official bond of a United States marshal, to recover the proceeds of a vessel which the marshal had failed to turn over to the libellant in accordance with the order of the Federal court. One of the grounds of defense was, that as the bond was executed to the United States and the plaintiffs were no parties to it, they had no

right or interest in the bond, and could not sue for a breach of the condition thereof. Plaintiffs recovered a judgment in the trial court, which was affirmed by the Supreme Court of the State. On writ of error to this court it was held that this court had no power to review the decision of the State court as to the legality of permitting Hernandez to sue upon the bond in his own name. We quote from the opinion (p. 132):

"It has been insisted, for the plaintiff in error, that the question raised upon the record, whether Hernandez, not being a party to the marshal's bond given to the United States, could maintain a suit upon it in his own name only, without suing in the name of the United States, for his use, is a question which can be re-examined in this court. We are not of that opinion. It is not every misconstruction of an act of Congress by a State court, that will give this court appellate jurisdiction. It is where the party claims some title, right, privilege or exemption, under an act of Congress, and the decision is against such right, title, privilege or exemption.

"In this case the plaintiff in error did not, and could not claim any right, title, privilege or exemption, by, or under the marshal's bond, or any act of Congress giving authority to sue the obligors for a breach of the condition; or, at most, his claim to exemption rests upon form, and not substance, as the law expressly charges him, and the objection is only that the name of the United States should have been inserted for the use of the plaintiff.

"*However we might be inclined to the opinion that, regularly, and in point of form, the suit should have been in the name of the United States, for the use of Hernandez, we have no jurisdiction or authority to re-examine, and either reverse or affirm the decision of the State court on that ground.*"

In the case of *Lewis v. Campau*, 3 Wall. 106, it was

held that "A final judgment or decree by the highest court of law or equity of a State that revenue stamps attached to a deed offered in evidence and objected to as not having stamps proportioned to the value of the land conveyed, are insufficient — is not a subject for review by this court under the 25th section of the Judiciary Act of 1789." With respect to this matter the Chief Justice stated:

"Neither the validity of the statute nor its construction was in any way drawn in question. The only question the court had to pass upon, and this only incidentally as affecting the admissibility of evidence, was the value of the land. This is not a question which can be brought into this court under the 25th section of the Judiciary Act."

Avery v. Popper, 179 U. S. 305, was an action by a chattel mortgagee of certain cattle against the purchaser of the same at a marshal's sale upon execution issued out of a Federal court. The question at issue was whether a chattel mortgage upon a portion of such cattle, which did not identify the particular animals covered by it, was good as against the purchaser of the entire lot at marshal's sale. It was held that no Federal question was presented. In the course of the opinion this court, speaking through Mr. Justice Brown, said:

"This was a question either of local law or of general law. If of local law, of course the decision of the Supreme Court of Texas is binding upon us. If of general law, as it involves no Federal element, it is equally binding in this proceeding, since only Federal rights are capable of being raised upon writs of error to State courts. *Conceding that, if the question had arisen on appeal from a*

Circuit Court of the United States, we might have come to a different conclusion, it by no means follows that we can do so upon a writ of error to a State court whose opinion upon a question of general law is not reviewable here."

* * *

The question as to whether attorneys' fees can be recovered upon an injunction bond given in a Federal court was passed upon by the Supreme Court of California in the case of *Mitchell v. Hawley*, 21 Pac. Rep. 833, and answered in the affirmative. We quote from the opinion of the court:

"We cannot agree with counsel in the view that in an action brought in a court in this State, on an injunction bond given in a court in the United States, counsel fees can, in no instance, be recovered as damages, because such damages are not allowed by the Federal courts. Bondsmen, in such a case, cannot be held to have contracted with the understanding that a suit would be brought upon the bond, if at all, in a Federal court, and that their liabilities would be fixed according to the view which that court might be supposed to take of the law. If, for instance, the defendants here and the defendants in the injunction suit were all residents of California, which was probably the fact, an action on the bond could probably not be maintained in a Federal court at all."

The same ruling was made in the case of *Hannibal etc. R. Co. v. Shepley*, 1 Mo. App. 254. The opinion of the court upon the point at issue reads as follows:

"In an action on a bond executed in an injunction suit in the United States Circuit Court, conditioned to pay all damages or costs that may be occasioned by the injunction, the word damages will be taken to include

reasonable counsel fees actually paid. Such a bond must be interpreted as any other contract, by the rules determined by the Supreme Court of Missouri; although a different interpretation may have been applied in cases by the Supreme Court of the United States. The rulings of the former are not merely authoritative; they are binding law in this State.

"It is argued by counsel for defendant in this case that as this bond was given in proceedings in equity of a Circuit Court of the United States, the obligation must be interpreted in view of the decisions of the Supreme Court of the United States, and the case is as if by statute of the United States it had been enacted that no counsel fees should be recovered in a suit on an injunction bond given in a Federal tribunal. A bond of this kind is to be interpreted by the rules that govern the interpretation of any other contract. If the obligor, when executing it, knew that under the ruling of the Supreme Court of the United States he could not be held by this obligation to pay counsel fees, he also knew by the interpretation put by the Supreme Court of Missouri upon the same obligation in a similar proceeding, he would be held for counsel fees in case of failure to maintain his injunction."

To the same effect are the cases of —

Wash v. Lackland, 8 Mo. App. 122.

Elliott v. M. K. & T. Ry. Co., 77 Mo. App. 652.

Aiken v. Leathers, 40 La. Ann. 23.

* * *

A writ of error to a State court brings before the Supreme Court only the Federal questions in the case. None other will be considered.

Ashley v. Ryan, 153 U. S. 436, 440.

Barbier v. Connolly, 113 U. S. 27, 29.

Watson v. Mercer, 8 Pet. 88.

When the case was decided on an independent ground broad enough to maintain the judgment and not involving a Federal question, this court will dismiss the writ of error without considering the Federal question.

Beatty v. Benton, 135 U. S. 244.

Marrow v. Brinkley, 129 U. S. 178.

Mo. Pac. Ry. Co. v. Fitzgerald, 160 U. S. 556.

Bacon v. Texas, 163 U. S. 207.

Seneca Nation v. Christy, 162 U. S. 283.

Hammond v. Johnston, 142 U. S. 73.

* * *

Counsel for plaintiff in error cite in support of their contention that this court has jurisdiction, the cases of *Bein v. Heath*, 12 How. 168, and of *Meyers v. Block*, 120 U. S. 206.

In the case of *Bein v. Heath*, the Federal court required an injunction bond containing certain conditions. A bond was given in accordance with the State practice, containing other and different conditions. Under the conditions of the bond actually given, suit could not be brought against the obligors until the amount of the damages caused by the injunction had been ascertained in the original suit upon the dissolution of the injunction. This court held that a court of equity could not proceed to ascertain the amount of damages and render judgment against the obligors upon the dissolution of the injunction; that the

obligee must be left to proceed in a suit at law to recover his damages. The court further held, that as no judgment had been or could be rendered against the obligors upon the dissolution of the injunction and prior to the institution of the suit under consideration, the contingency on which the obligors agreed to pay had not happened, and that a suit could not be maintained upon the bond.

It will thus be seen that the questions involved in this court in that case went direct to the validity of the injunction bond, and that the decision in that case has no bearing upon the proposition now under consideration.

In the case of *Meyers v. Block*, an injunction bond was given in a proceeding in the Federal court in Louisiana, which was almost identical with the bond given in the case of *Bein v. Heath*. Plaintiffs in error sought to have this court follow the case of *Bein v. Heath*, and to render a similar judgment. This court refused to do so, and rendered judgment affirming the decision of the lower court. The case of *Bein v. Heath* was reviewed and distinguished. Among the assignments of error in the case of *Meyers v. Block* was the following one, which the court refused to sustain:

"The Supreme Court of Louisiana erred in subjecting the plaintiffs in error to the law and jurisprudence of Louisiana, when they were parties to an injunction bond given in equity in and by order of the Federal court."

No question was raised in the case of *Meyers v. Block*

with respect to the jurisdiction of this court, and there is nothing decided in that case which is contrary to our contention in this case. As a matter of fact, the real question at issue in that case was as to the validity of the bond. The validity of the bond is not in controversy in the case at bar.

In the opinion of this court in the case of *Meyers v. Block*, this statement appears:

"The court not only construed the bonds in this way, but decided the cases upon this view as to their meaning and effect, *awarding to the plaintiffs respectively only such damages as arose from the effects of the respective injunctions.*"

In view of this statement of the court, it becomes a matter of interest to know whether or not attorneys' fees were allowed as an element of damages by the State court in that case. Neither the report of the case in this court nor in the Supreme Court of Louisiana throws any light upon the subject, and we have been unable to examine the record. However, there is information upon the subject in the case of *Aiken et al. v. Leathers et al.*, 40 La. Ann. 27, which we assume to be accurate. That was a suit in the State court upon an injunction bond given in the Federal court, and in it the question as to whether or not attorneys' fees constitute a proper element of damages was fully considered. The cases of *Bein v. Heath* and *Meyers v. Block*, as well as the case of *Oelrichs v. Spain*, were care-

fully considered, and the conclusion reached that attorneys' fees should be allowed as damages. In the course of the opinion reference was made to the damages allowed in the case of *Meyers v. Block,* and we call special attention to it:

"The conditions of the bond in the instant case was that the obligors would 'well and truly pay to Aiken all such damages as he may recover against us in case it should be decided that the injunction or restraining order was wrongfully obtained;' which is almost in terms precisely similar to the conditions in the bonds construed in the Block-Levi cases by the Supreme Court of the United States.

"*Now, a reference to the records of those cases shows that counsel fees were an element of damages, in the demand as well as in the proof.* Hence we feel authorized to conclude that the decisions which we have considered and consulted are not to be construed as excluding counsel fees as an element of damages in an action *at law* in a Federal court, and *a fortiori* in a Louisiana court for the recovery of damages on a bond of injunction given in and by the order of a Federal court in an equity proceeding."

The question as to counsel fees being a proper element of damages upon an injunction bond, was also considered by the Supreme Court of Louisiana in the case of *Aiken et al. v. Leathers et al.,* reported in 37 La. Ann. 482, and a decision reached in favor of the allowance of such fees. In that case the court say:

"*This identical question was before us in Block v. Meyers, 35 Ann. 220, presented in the same form with reliance upon the same authority.*"

* * *

Counsel argue in favor of the jurisdiction of this court

upon the ground, among other things, that the United States Circuit Court had the power to modify the terms of the injunction order and bond. Conceding this power, it does not follow that this court has jurisdiction to review the decision of the State court on the measure of damages fixed by it in a suit upon the injunction bond. Counsel certainly do not mean to ask this court to modify the judgment of the State court because the Circuit Court may have had the power to change the terms of the injunction bond.

If relief were desired under a power of this sort, the Circuit Court should have been requested to make the modification desired. If it had done so, and the State court had refused to observe or give force to the changes made, then a case might have been made for this court. Nothing of this sort was attempted, and the State court could do nothing less than give effect to the bond as it stood.

II.

Even though this Court should be disposed to Review the Action of a State Court in allowing Attorney-Fees as an Element of Damages in a Suit upon an Injunction Bond given in a Federal Court, it will not do so in this case, as the Point was not Properly Preserved.

"To give this court jurisdiction to review the judgment of a State court under section 709, Rev. Stat., because of the denial by the State court of any title, right, privilege

or immunity, claimed under the Constitution or any treaty or statute of the United States, it must appear on the record that such title, right, privilege or immunity was 'specially set up or claimed' at the proper time, in the proper way."

Chappell v. Bradshaw, 128 U. S. 132.

In the case last cited, suit was brought to recover damages caused by permitting a burning scow to run against plaintiff's schooner, thereby burning and injuring it. Judgment was rendered in favor of plaintiff, which was affirmed by the Court of Appeals of Maryland. The defendant thereupon moved for a rehearing on the ground that the trial court should have *limited the measure of damages* to the value of the scow which occasioned the injury complained of, under the provisions of sec. 18, ch. 121, of the act of Congress of June 26, 1884. The Court of Appeals overruled the motion, inasmuch as this point had never been raised in the Circuit Court when the case was tried, nor before that court on appeal. Thereupon the case was brought to this court on writ of error. The case was dismissed by this court for the reasons above given.

For other cases holding that any title, right, privilege or immunity, claimed under the Constitution, etc., must be specially set up or claimed, see:

Leeper v. Texas, 139 U. S. 462.

Morrison v. Watson, 154 U. S. 111.

Winona &c. Land Co. v. Minnesota, 159 U. S. 540.

Zadig v. Baldwin, 166 U. S. 485.

Oxley Stave Co. v. Butler Co., 166 U. S. 648–655.

Not only must the right, title, privilege or immunity be set up, but it must be *specially* set up. That means that *the constitutional provision or the law relied upon* must be specified by the party claiming under it in the State court.

"In *Maxwell v. Newbold*, 18 How. 511, 516, which was a writ of error to the Supreme Court of Michigan, this court, speaking by Chief Justice Taney, and referring to the 25th section of the Judiciary Act of 1789, and the interpretation placed upon it in *Crowell v. Randall*, 10 Pet. 368, said: 'Applying this principle to the case before us, the writ of error cannot be maintained. The questions raised and decided in the State Circuit Court point altogether for their solution to the laws of the State, and make no reference whatever to the Constitution or laws of the United States. Undoubtedly this did not preclude the plaintiffs in error from raising the point in the Supreme Court of the State, if it was involved in the case as presented to that court. And whether a writ of error from this court will lie or not, depends upon the questions raised and decided in that court. But neither of the questions made there by the errors assigned refers in any manner to the Constitution or laws of the United States, except the third, and the language of that is too general and indefinite to come within the provisions of the act of Congress, or the decisions of this court. It alleges that the charge of the court was against, and in conflict with, the Constitution and laws of the United States. But *what* right did he claim under the Constitution of the United States which was denied him by the State court? *Under what clause of the Constitution* did he make his claim? And *what* right did he claim under an act of Congress? *And under what act*, in the wide range of our statutes, did he claim it? The record does not show; nor can this court undertake to determine that the question as to the faith and credit due to the record

and judicial proceedings in Ohio was made or determined in the State court, or that that court ever gave any opinion on the question. For aught that appears in the record, some other clause in the Constitution, or some law of Congress may have been relied on, and the mind of the court never called to the clause of the Constitution now assigned as error in this court.' After stating the grounds upon which the decision in *Lawler v. Walker*, 14 How. 149, was placed, the court proceeded: 'So in the case before us, *the clause in the Constitution and the law of Congress should have been specified by the plaintiffs in error in the State court*, in order that this court might see what was the right claimed by them, and whether it was denied to them by the decision of the State court.'"

In the case of *Messenger v. Mason*, 10 Wall. 507, objection was made in the State court to the introduction in testimony of the record of a judgment on the ground that the law under which the proceedings were had was unconstitutional and void. The certificate of the Supreme Court of Iowa to the record sent to this court certified that the validity of the law under which the said judgment was rendered, was drawn in question on the ground among other things that the same was in conflict with the Constitution of the United States. This court, following the decisions in *Maxwell v. Newbold*, 18 How. 511; *Lawler v. Walker et al.*, 14 How. 149; and *Hoyt v. Shelden*, 1 Black, 518, held that the constitutional objection was too general to be noticed on a writ of error under section 25 of the Judiciary Act.

In the case of *Bridge Proprietors v. Hoboken Co.*, 1 Wall. 116, 143, it was held that it was not necessary to

set forth the particular act of Congress or part of the Constitution relied on, in express words; that "the true and rational rule is, that the court must be able to see clearly, from the whole record, that a certain provision of the Constitution or act of Congress was relied on by the party who brings the writ of error, and that the right thus claimed by him was denied."

See also,

Chapin v. Frye, 179 U. S. 127.

Now, is it possible to determine from the record in this cause that a certain clause of the Constitution or a certain law of the United States was relied upon by plaintiff in error in the State court? We have set out, *supra*, everything contained in the record in any way tending to show that a Federal question was relied upon. The most explicit assertion of the right is contained in the amendment to the answer, and for convenience we again quote from it:

"Under the law of the United States, and as enforced and existing in the Federal courts at the time of the execution of said bond, attorneys' fees could not be allowed as damages in a suit brought upon an injunction bond given in the Federal court for a breach of said bond; that said bond was executed by this defendant in contemplation of and in reliance upon the law so as aforesaid regulating the liability of sureties upon bonds in the Federal courts; that ever since the execution of said bond the law of the Federal courts regarding said measure of damages and denying the right to recover attorneys' fees as a part thereof has remained the same."

There is absolutely nothing in the foregoing statement,

or in the record as a whole, to show that any particular Federal law or constitutional provision was relied upon by plaintiff in error. There is nothing even to show upon what decision or decisions of the Federal courts, reliance was placed.

The statements in the record in regard to a Federal question being involved with respect to the allowance of attorneys' fees, is altogether too general to come within the terms of section 25 of the Judiciary Act, requiring the right, title, privilege or immunity to be *specially* set up.

III.

The Questions presented as to whether Attorneys' Fees should have been allowed for resisting the Allowance of a Temporary Injunction; whether they were Properly Apportioned; whether Mulvane was improperly allowed for Fees paid on account of other Defendants; whether he was erroneously allowed for Fees paid to more than a single Attorney or firm of Attorneys,—are all Questions of General Law with which this Court will not interfere.

This proposition has been sufficiently discussed in connection with the general proposition as to whether this court will review the decision of the State court on the allowance of any attorneys' fees.

IV.

The Points relied upon with respect to the Allowance of Attorneys' Fees for resisting the granting of a Temporary Injunction; with respect to the Failure to properly apportion the Fees; and with respect to other matters set forth in our Third Proposition, supra, will not be considered by this Court, for the reason that they were Not Properly Preserved.

Nothing can be found in the record stating or even intimating that a Federal question was involved in any of these points. No Federal question was specially set up or claimed with respect to them.

V.

The Rulings of the State Court upon the Questions as to whether Attorneys' Fees should be allowed for resisting the granting of a Temporary Injunction; whether they were properly apportioned; whether Mulvane was improperly allowed for Fees paid on account of other Defendants; whether he was erroneously allowed for Fees paid to more than a single Attorney or firm of Attorneys,—were all correctly decided by the State Court.

ATTORNEYS' FEES FOR RESISTING THE GRANTING OF A TEMPORARY INJUNCTION.

(Specification 4, page 18.)

This point was not presented to the Supreme Court of Kansas on the last hearing. There is nothing in the rec-

ord to show that that court considered or passed upon it. There is no discussion of the subject in our brief, filed in that court, which is attached to and made a part of this brief. We give, however, a copy of that portion of our brief used on the first hearing, which relates to this particular matter:

Defendant in error insists that Mulvane can only recover attorneys' fees expended in obtaining a dissolution of the injunction — that he cannot recover fees paid for resisting its allowance, which is treated as an unsuccessful effort to obtain its dissolution.

We have taken occasion to look up some of the authorities in support of the proposition that attorneys' fees cannot be recovered for an unsuccessful attempt to obtain the dissolution of a temporary injunction. That point is not decided by the Supreme Court of California in the case of *Mitchell v. Hawley*, 21 Pac. Rep. 833. It merely refers to a couple of New York cases without affirming the point. The case of *Randall v. Carpenter*, 88 N. Y. 293, is based upon the case of *Newton v. Russell*, 87 N. Y. 527; that case upon this point follows *Allen v. Brown*, 5 Lans. 511. The case of *Allen v. Brown* follows the case of *Childs v. Lyons*, reported in 3 Robertson, 304. That is a report of the Superior Court of New York City. Not until the last-mentioned case is reached will the court find

any reason given for the rule referred to. We quote from the opinion of the court:

"I cannot see on what principle the costs of unsuccessful efforts to remove an injunction can be said to be damages arising from its existence. Costs and counsel fees on a successful motion to dissolve an injunction are considered the natural consequences of its existence, and are properly damages; but there is no reason why the party obtaining the injunction should pay the expenses of ill-directed experiments to get rid of it. Any such a charge would be a premium upon the employment of unskillful counsel. Such items ought not properly enter into the estimate of damages upon the undertaking."

We submit that the reasoning of the court is not sound. If it be finally determined that the injunction ought not in the first instance to have been allowed, it is hardly proper to say that the defendant who is enjoined is not justified in making every possible effort to get rid of the injunction. He is not the party to blame if costs and expenses are incurred by reason of honest efforts on his part to obtain justice. It is rather the fault of the party who insists upon the allowance of the injunction, and of the court that erroneously refuses to dissolve the injunction. It is the duty of a person against whom an injunction is improperly granted to take prompt steps to protect himself therefrom. As said in Sutherland on Damages, vol. 2, p. 65:

"Where an injunction has been improvidently granted, or obtained without good cause, the defendant should take seasonable steps, probably, to relieve himself from its operation, and thus prevent damages. . . . The law sanctions a resort to appropriate means, and the employ-

ment of counsel is such, for obtaining relief from an injunction."

According to the doctrine of the cases cited, it makes no difference how erroneously an injunction may have been granted — the defendant is entitled to no compensation for fees paid attorneys in seeking to obtain a dissolution of the injunction, if the court before whom the motion is pending does not possess a sufficient knowledge of the law to correctly decide the case. The higher courts may afterwards determine that the party who was pressing the motion was correct in his contention and that the injunction should have been dissolved — that is a matter not to be considered. The reasoning seems strange, to say the least.

But the case at bar does not come within the range of those cases. The effort of Mulvane to obtain a dissolution of the injunction was a successful one, and it will hardly be contended that his resistance of the granting of the injunction in the first place comes within the category of "ill-directed experiments to get rid of it" (the injunction) referred to in the case reported in 3 Robertson. He certainly had the right, and it was his duty, to resist the granting of the injunction, and in this way avoid the damages which would be occasioned by its issuance.

Under the authorities it is very plain that plaintiff is entitled to recover for the full value of the services of his attorneys in and about the allowance and dissolution of

the temporary injunction, inasmuch as it was afterwards finally determined that the injunction was improperly issued.

In support of this, we cite the following:

Sutherland on Damages, vol. 2, p. 64, sec. 7.

"*Injunction Bonds. Scope of Obligation:* These are statutory obligations, and though various in their phraseology, they have a general similarity of purpose and effect, binding the obligors to pay all such damages, or costs and damages, as the party enjoined shall sustain in consequence of the injunction, if it shall be dissolved, or if the court shall finally decide that the plaintiff was not entitled to it. When an action accrues, there is a right to damages, first, *for costs and expenses incurred in defending against the writ*, and in procuring its dissolution; and second, for losses or injuries from its operation in respect to the subject to which it refers."

Robertson v. Smith et al., 28 N. E. Rep. 857.

In the case last cited the court stated that the rule as to the measure of damages was as follows:

"We are of the opinion that the correct rule is to allow attorney's fees and like expenses in so far as it relates to services rendered *in resisting the making of the injunction*, or in procuring its dissolution, although other matters may be involved in the litigation."

Swan v. Timmons, 81 Ind. 243.

We quote from the opinion of the court in the last case cited:

"In dismissing his suit for an injunction, the appellant confessed that he had at that time no legal or equitable right to the relief sought, and the dismissal was a breach of the bond. (7 Ind. 207; 18 Cal. 625; 16 Barb. 325.) Where a party applies for an injunction and is forced to a

dismissal by a plea in abatement, he cannot, in an action upon the bond, have his right to another injunction determined. The dismissal of the action in which the bond was executed is such a breach as vests in the obligee a right of action for expenses incurred *in making the necessary resistance;* and in estimating damages in such a case, it is proper to take into consideration such reasonable attorney's fees as may have been necessarily paid or contracted for in making the proper resistance. (59 Ind. 93; 44 Ind. 392.)"

Miles v. Edwards, 9 Pac. Rep. 814.

The syllabus in the last case cited reads as follows:

"Fees paid to an attorney for securing the dissolution of the injunction, if they are reasonable, are a proper element of damages in an action on the injunction bond."

We quote from the opinion of the court:

"The uncontradicted testimony is that the three hundred dollars paid for attorney's fees was paid for attorney's services in doing whatever pertained to said order, *in preventing the injunction from issuing* and getting rid of the order issued. The respondents were bound to appear at the hearing — to remain until the hearing closed. It was proper that they should be represented throughout by counsel. It was right that they should pay their attorneys. It is just that they should recover from the appellants the amount so paid, if the services were necessary and the price was reasonable. The very terms of the bond are to pay the said defendant any and all damages he may sustain by reason of the said order or the issuing thereof."

Ah Thaie v. Quan, 3 Cal. 219.

We quote from that case:

"It appears to us that the principle is not only just in equity, but sound in law, that *all damages to which the party may be put by the wrongful issuance of the injunction* should be recoverable in actions upon such a bond, and

reasonable counsel fees should be included in those damages."

Certainly the expenses incurred by Mr. Mulvane in resisting the granting of the injunction in the first place, and in procuring its dissolution thereafter, were damages to which he was put by the wrongful issuance of the injunction.

Upon this point also see *Tyler v. Safford*, 31 Kan. 610.

In the case of *Meyers v. Block*, 120 U. S. 213, it was assigned as error that the court below held that the bond, construed with the order requiring it, bound the obligors *for damages sustained before it was given*. The court said:

"The solution of the question raised by this assignment depends upon the fair construction of the order, and of the bond given in pursuance of it, and read (as it should be read) in the light of it. The order was, 'that the injunction be maintained on the complaining creditors giving bond and security to save the parties harmless from the effects of said injunction.' The last words clearly mean *all the effects* of the injunction. The condition of the bond was to pay 'all such damages as he (the obligee) may recover against us in case it should be decided that the said writ of injunction was wrongfully issued.' It seems plain to us that *all the damages arising from the wrongful issue of the injunction* were intended to be covered by the bond as well as by the order; in other words, that the bond was intended and understood as a compliance with the requirements of the order. . . . It is unnecessary to review the authorities on this subject. It is undoubtedly true that a surety cannot be held beyond the terms or legal effect of his engagement; and when that has respect to the conduct or fidelity of the principal, or to any other matter usually contemplated as arising in the future, it is to be interpreted prospectively and

not retrospectively. *But if, from the nature of the case, the subject of guaranty is a past transaction* in whole or in part, and the language of the engagement, taken in its natural sense or legal effect, is broad enough to cover it, such language may properly be construed to do so."

See also *Andrews v. Woolen Co.*, 50 N. Y. 282.

Cook v. Chapman, (N. J.), 2 Atl. 286.

The condition of the bond in this case was that the obligors should pay the defendants all damages which "they or either of them have already sustained, or may at any time sustain by reason of the granting and issuing of said temporary injunction, if it shall be finally decided that *said restraining order* or said temporary injunction ought not to have been granted."

Now, it would be trifling with the rights of the obligees of this bond to say that attorneys' fees were a proper element of damages under it, that they were entitled to recover *all* damages sustained by reason of the granting of the injunction, and then to say in the same breath that attorney-fees paid in resisting the issuance of the injunction could not be allowed.

THE APPORTIONMENT OF ATTORNEYS' FEES AS BETWEEN THE INJUNCTION PROCEEDING AND THE MERITS OF THE CASE, AND AS BETWEEN MULVANE AND THE OTHER DEFENDANTS.

(Specification 5, paragraphs 1, 2, 3, 4, pages 18 and 19.)

On these points we refer the court to the argument found on pages 54 to 72 of our brief, filed in the State

court, which is attached to this brief. We also call attention to the opinion of the Supreme Court of Kansas upon this point, on page 285 of the record.

VI.

The Question as to whether Suit could be brought upon the Injunction Bond upon the dismissal of the Injunction Branch of the Case; and in this connection whether it was Error to admit the Stipulation dismissing the Injunction Proceedings, are Questions of General Law which will not be reviewed by this Court.

The Questions are not Properly Preserved.

They were all correctly decided by the State Court.

We have already sufficiently discussed the proposition as to whether this court has the power to review upon writ of error to a State court the points involved in this proposition. They are all questions of general law, upon which the decision of the State court is final.

We also desire to have the court bear in mind that there is nothing in the record in any way indicating that a Federal question was connected with these points. No Federal question with respect to them was specially set up or claimed in the court below.

* * *

For our views upon the question as to whether the suit

upon the injunction bond was properly brought upon the dismissal of the injunction branch of the case, without waiting for the issue as to damages to be determined, and, involved in this of necessity, the admissibility in evidence of the stipulation dismissing the injunction proceedings, see our argument on pages 20 to 24 of the brief filed in the State court, and attached hereto. For the opinion of the Supreme Court of Kansas upon the question, see page 283 of record.

For our argument on the contention of counsel that the opinion of the Circuit Court of Appeals was not admissible in evidence, see pages 24 to 39 and 46 to 51 of appended brief.

VII.

The Question as to whether a Surety upon an Injunction Bond given in a Federal Court can escape Liability by the Dismissal of the Injunction Proceedings after a dissolution of the Temporary Injunction, is a Question of General Law with which this Court will not interfere upon Writ of Error directed to a State Court.

The Point was not Properly Preserved.

The Point was correctly decided by the State Court.

We also desire to emphasize the fact, in connection with the foregoing point, that there is nothing in the record to show that a Federal question was involved in it. No

Federal question was specially set up or claimed with respect to it in the State court. Neither is the question one which this court will consider on a writ of error to a State court. It is a question of general law upon which the decision of the State court is final.

For our argument upon the merits of this proposition, see pages 51 to 54 of the annexed brief. For the opinion of the Supreme Court of Kansas upon the subject, see page 285 of the record.

For other authorities see:

Gyger v. Courtney, (Neb.) 81 N. W. 437.

Richardson v. Allen, 74 Ga. 749.

Swan v. Timmons, 81 Ind. 243.

Ascrado v. Orr, 100 Cal. 293 [34 Pac. 777].

Dowling v. Pollack, 18 Cal. 625.

Pugh's Adm'r v. White, 78 Ky. 240.

Hibbard v. McKindley, 28 Ill. 255.

Newsomond Timber Co. v. Roundtree, 29 S. E. 61.

De Berard v. Prial, 54 N. Y. S. 534.

In connection with this matter we call attention to the fact that it was not until after the temporary injunction was dissolved upon a full hearing, that the injunction branch of this case was dismissed.

The court will also bear in mind that Mr. Mulvane was not a party to the stipulation dismissing the injunction

branch of the case. The dismissal was made without any concurrence upon his part.

We furthermore call special attention to the last paragraph of the stipulation, which reads as follows (Record, p. 175):

"5. Nothing in this stipulation shall enlarge or lessen, or in any manner affect the rights or remedies of complainants against Joab Mulvane in this suit or in any other action, except as contained in paragraph 2 hereof; *nor shall anything contained herein enlarge or lessen, or in any manner whatever affect the rights or remedies of Joab Mulvane against complainants in this or any other action.*"

A. L. Williams,

Overmyer, Mulvane & Gault, and

N. H. Loomis,

Attorneys for Defendant in Error.

In the Supreme Court

OF THE

STATE OF KANSAS.

A. J. Tullock, Plaintiff in Error,

vs.

Joab Mulvane, Defendant in Error.

No. 11,318.

STATEMENT OF FACTS.

As the statement of facts contained in the brief of plaintiff in error is not entirely satisfactory, we will make one in accordance with our understanding of the evidence.

This was an action commenced by Joab Mulvane, plaintiff below, against A. J. Tullock and W. M. D. Lee, upon an injunction bond. No service was had upon Lee, and the case proceeded to trial and judgment against Tullock alone. The case was originally tried in the circuit court of Shawnee County and a judgment rendered in favor

of the plaintiff for $4,731.12. The plaintiff not being satisfied with the amount of the judgment appealed the case to this court, where the decision of the lower court was reversed. The opinion of this court in that case is reported in 58 Kansas, page 622.

The case thereafter came on for trial in the district court of Shawnee County, before the court and a jury. A verdict was rendered in favor of the plaintiff for $25,000. A motion for a new trial was filed by the defendant and argued at length. It was overruled by the court and thereupon an appeal was perfected by the defendant to this court.

Upon December 14, 1889, Mr. Mulvane entered into a preliminary agreement with certain parties (Wescott and Hanson) for the sale of the capital stock of The Topeka Water Supply Company for $500,000.

The agreement reads as follows (p. 287 of record):

"BOSTON, December 14, 1889.

"GENTLEMEN: I will sell you the entire capital stock of The Topeka Water Supply Company of Topeka, Kansas, which consists of 4,000 shares of par value of $100 per share, for the sum of five hundred thousand dollars ($500,000), on the following terms of payment, viz.: *The sum of sixty*

thousand dollars ($60,000) to be paid in cash on the signing of a contract to be made and entered into as of this date, the consideration named in said contract to be four hundred and forty thousand dollars ($440,000), to be paid as follows, viz.: The sum of two hundred thousand dollars ($200,000) to be paid February 10, 1890, one hundred and forty thousand dollars ($140,000) to be paid February 20, 1890, and one hundred thousand dollars ($100,000) to be paid March 20, 1890, provided, that final payment of the last named sum of one hundred thousand dollars may be paid on February 20th, if said Wescott and Hanson may elect so to do, by giving me five days' notice of such intention.

"Payments to be made for and delivery of said stock to be made at the National Bank of North America, in the city of Boston, Mass.

To Geo. P. Wescott, Samuel Hanson.

Joab Mulvane.

"We hereby accept your offer to sell the entire capital stock of The Topeka Water Supply Company for the price and on the terms and conditions above stated.

Geo. P. Wescott,
Samuel Hanson."

The foregoing instrument was executed in the city of Boston late in the evening of Saturday, December 14, 1889. There had been some preliminary negotiations between the parties at Topeka, Kansas, on the 12th of the preceding November. Geo. P. Wescott and Samuel Hanson resided respectively in Portland, Maine, and Boston, Mass., and represented the Maverick Bank

of Boston in the purchase of water works plants and their securities. Joab Mulvane resided at Topeka, and was the chief executive officer and a large shareholder of The Topeka Water Supply Company. The record shows that the parties had met by appointment in the city of Boston on the day the agreement bears date, and that they had a lengthy conference before it was signed. In the course of that interview Mr. Mulvane informed Messrs. Wescott and Hanson that he had not yet succeeded in obtaining control of certain shares of stock of The Topeka Water Supply Company of the par value of $12,000 (see affidavit of Geo. P. Wescott, found on page 33 of "Exhibit A" to record); that the residue of the stock was within his control, but that he only had shares of the par value of $40,000 with him; that he must have $60,000 cash in hand on signing the contract, and that a Mr. Burr, who was president of a Boston bank, would probably be willing to guarantee that the payment of the $60,000 would be a safe thing to do under these circumstances (see affidavit of Geo. P. Wescott, *supra*). With this information the instrument above set out was drawn and signed and the parties separated to meet on the following Monday, December 16, 1889.

When they met on the succeeding Monday, Messrs. Wescott and Hanson submitted a form of contract to be signed by Mr. Mulvane in pursuance of the stipulation in the preliminary agreement above set out, which provided that the $60,000 should be paid to Mulvane on the signing of the same, *but which also contained the provision that the defendant should "at once place in the hands of the cashier of the National Bank of North America in the city of Boston, Mass., the certificates representing the entire capital stock of the Topeka Water Supply Company."* (This draft of contract may be found on page 28 of "Exhibit A" of record.) Wescott and Hanson further informed Mulvane that the Mr. Burr referred to had refused to give the above mentioned guarantee, although he had given Mulvane a high recommendation for integrity and financial ability (see affidavit of Geo. P. Wescott, *supra*). Wescott and Hanson refused to pay the $60,000 as provided in the agreement made on the preceding Saturday, and insisted that Mulvane should deposit the entire capital stock of the Water Supply Company in the National Bank of North America before the payment would be made.

Mr. Mulvane insisted that, under the terms of

the agreement, he was entitled to the $60,000 without making a deposit of the entire capital stock of the Water Company; that he had with him only $40,000 of the capital stock; that he did not yet control all of it, and that Wescott and Hanson knew those facts at the time the agreement of December 14th was executed. After several hours' conference Mr. Mulvane became convinced that the $60,000 payment would not be made in accordance with the terms of the agreement, and declared the negotiations to be at an end.

Mr. Wescott made the following statements in regard to the breaking off of the negotiations, in his affidavit, found on pages 37, 39 of "Exhibit A:"

"In conversation we told him (Mulvane) that we had a conference with Mr. Burr in regard to his standing and business integrity, which we explained had been made necessary because the bank closed at two o'clock, and we wished to know before meeting him whether Mr. Burr would guarantee the performance of the agreement which Mr. Mulvane had said to us Saturday evening that Mr. Burr would do. I informed him that Mr. Burr had given him a high recommendation for integrity and financial ability, but he was not willing to guarantee the safe delivery of the stock agreeable to the terms of the contract provided for, and did not think that Mr. Mulvane should

ask us to do so, until the stock had been put up against the money in the hands of some bank or responsible person; then he (Mulvane) said I understand you will not put up the money unless I put up the stock, and this means more delay. We replied that inasmuch as Mr. Burr would not guarantee his so doing, we must insist on some security. He took the ground that this was an evasion of the contract and that we ought to pay the money to him, because he was responsible, and he had expected that his standing at home and his well-recognized financial ability to make good his promises would be accepted here readily, and that we should make the payment of $60,000 without his putting anything against it except his receipt on account; and he thought the recommendation of Mr. Burr had given him was ample and all that had been contemplated or expected by him at the time of our interview on Saturday, and he expected that we would pay the money on the recommendation given by Mr. Burr. * * * Mr. Mulvane left the room and when he came back about half-past five he said he was satisfied that we could not raise the money and consequently he had determined to declare the whole matter off, and opened the door and left the room."

The affidavit of Geo. P. Wescott, to which we have referred in support of the foregoing statements, was made on January 28, 1890. Afterwards and on February 16, 1891, Mr. Wescott was examined at length in regard to these negotiations, and we give a few excerpts from his testimony:

He testified on page 127 of "Exhibit A," that

he had not declined to pay Mr. Mulvane the $60,000 unless he put the stock up, and stated that he would have put that amount up if Mulvane had completed the agreement. Then these questions were asked:

"Q. If he had signed the agreement?

A. If he had signed the agreement I would have done it. That is provided for in the Saturday's contract, and if he had demanded his money he would have got it right then and there.

Q. Just on the signing?

A. Just on the signing; *he was entitled to it on the Saturday contract.*

Q. Without a deposit of the stock?

A. Without a deposit of the stock."

(P. 119, "Exhibit A.") "Q. He was to receive $60,000 during that trip, was he not?

A. To be paid at the Bank of North America.

Q. At that time?

A. At that time.

Q. He was not paid that $60,000?

A. For this reason—

Q. I do not ask for the reason; he was not paid that $60,000?

A. He was not.

Q. Now you may state the reason.

A. Because the payment was to be made *to the Bank of North America*, and not to Mr. Mulvane, at the Parker House.

Q. Any payment offered at the Bank of North America?

A. No, sir.

Q. Why?

A. It was to be paid to Mr. Mulvane at that point, *not to the bank.*

Q. Why was it not paid to him at that point?

A. Because Mr. Mulvane refused to complete the agreement he had made on Saturday.

Q. Did he state to you at that time that he did not believe you had any money?

A. He did not." * * *

(P. 120.) "Q. Now, I ask you if you stated in the affidavit that he did?

A. I have not got the affidavit before me. (Affidavit handed to witness.) Yes; it is here that he said he was satisfied we could not raise the money.

Q. You did, then, make that statement in your affidavit?

A. I did; that is correct."

(P. 121.) "A. * * Then I asked him (Mr. Burr) if in his judgment it would be safe for me to pay him $60,000 and let him make delivery of the stock at his pleasure; he thought it would not be a good thing for me to do; he did not think Mr. Mulvane would ask us to do it.

Q. It was, then, on the strength of this, was it not, that you failed to offer Mr. Mulvane the $60,000?

A. No, sir; it was on his failure to sign the contract. If he had carried out the agreement, and if he had signed the contract and supplemental contract of Monday, the money that we required and the payment of the $60,000 would have been arranged all right.

Q. Arranged how? Would you have paid him the $60,000 then?

A. We would have paid it into the bank.

Q. Into the bank. Would you have paid it to him?

A. Not without his putting some stock against it. *We could not unless he put some stock against it.*

Q. But did he not state at the interview on the first day that the stock was at his home, all but $12,000 ($40,000).

A. Yes, sir.

Q. Don't you know you would not have paid him $60,000 unless he put the stock against it?

A. I presume we should not, but the question was not put in that way. If there had been a disposition it could have been arranged undoubtedly.

Q. I ask you now if, but for this interview with Mr. Burr, you would have paid the $60,000 to Mr. Mulvane without his putting up stock against it?

A. *I think not.*"

(P. 122.) "Q. If Mr. Burr had said he would guarantee the carrying out of that contract you would have delivered Mr. Mulvane the $60,000 would you not?

A. Our proposition was to pay it to Mr. Burr; to make the payment to him as middleman, and Mr. Mulvane was to put up stock against it.

Q. That was the proposition that you made to Mr. Mulvane?

A. That was the proposition I made to Mr. Mulvane—that we would put up $60,000 *and he should put stock up against it and draw the money.* * * *

Q. I will put the question in another form and see if I can get an answer. If Mr. Burr had guaranteed the future delivery of the stock within the time mentioned upon the payment of the $60,000 to Mr. Mulvane, you would have paid Mr. Mulvane the $60,000, would you not, on that guarantee?

A. I have no doubt we should.

Q. But you would not after what Mr. Burr had said to you?

A. *No.*"

After the negotiations with Wescott and Han-

son were at an end, Mulvane entered into a contract with Coffin and Stanton and Woodbury and Moulton for the sale of the capital stock of the Water Company for the sum of $550,000. This contract was dated December 18, 1889, and may be found on page 82 of "Exhibit A" of the record. Coffin and Stanton and Woodbury and Moulton paid $50,000 down to Mulvane at the time the contract was executed. The balance was to be paid and the stock was to be delivered upon February 10, 1890. Just five days before the date fixed for the execution of the contract made with Coffin and Stanton and Woodbury and Moulton, Wescott and Hanson brought an action in the United States Circuit Court for the District of Kansas against Joab Mulvane and others, praying for a specific performance of the alleged contract made between them and the said Mulvane on December 14, 1889, and for an injunction to prevent the carrying out of the contract with Coffin and Stanton and Woodbury and Moulton. The defendants joined with Mulvane in the case were The Topeka Water Supply Company, The Topeka Water Company, Coffin and Stanton and the Atlantic Trust Company. Woodbury and Moulton were not made parties.

Upon the filing of the bill of complaint in that case the court issued a restraining order to prevent the execution of the contract made with Coffin and Stanton and Woodbury and Moulton (p. 14, "Exhibit A" to record), and afterwards upon February 13, 1890, issued a temporary injunction of the same tenor and effect which was to be in force upon the giving of an injunction bond in the sum of $75,000 (p. 41, "Exhibit A" to record).

Upon February 15, 1890, the court permitted the complainants, Wescott and Hanson, to deposit $75,000 in lieu of an injunction bond, for the protection of the defendants (p. 42, "Exhibit A" to record), and afterwards, on June 3, 1890, permitted them to give an injunction bond in the sum of $75,000 and allowed the cash deposit to be withdrawn (p. 96 of "Exhibit A" to record). A copy of the bond is attached to the petition in this case and may be found on page 104 of the record.

Upon March 10, 1890, a motion was filed to dissolve the injunction (p. 76 of "Exhibit A" to record), which came on to be heard before Judge Caldwell, at Little Rock, upon April 4, 1890. The former proceedings in the case had been heard before Judge Foster. Judge Caldwell dis-

solved the temporary injunction upon that day (p. 88 of "Exhibit A" to record).

Upon November 28, 1890, a stipulation was entered into between complainants on the one hand and Coffin and Stanton, by Silas B. Jones, their solicitor, and A. L. Williams and J. D. McFarland, solicitors for The Topeka Water Supply Company and The Topeka Water Company on the other hand, whereby so much of the bill of complaint as sought a specific performance of the contract between Mulvane and Wescott and Hanson was dismissed, and the case was to be proceeded with as one for damages upon a breach of contract. All of the defendants except Joab Mulvane were dismissed from the case. The stipulation, which is set out on page 100 of "Exhibit A" to record, reads as follows:

"It is hereby stipulated in the above entitled cause, between the complainants and defendants Coffin and Stanton and The Topeka Water Supply Company and The Topeka Water Company, as follows:

"1. The complainants hereby dismiss their bill as to the above named defendants, Coffin and Stanton, The Topeka Water Supply Company, The Topeka Water Company, and discharge said defendants and each of them from all liability to complainants by reason of any of the matters alleged or prayed for in the bill of complaint in this cause.

"2. *Complainants hereby withdraw so much of their bill as seeks a specific performance of the alleged contract between complainants and Joab Mulvane, described in said bill of complaint.*

"3. In consideration of the above, the said defendants, Coffin and Stanton, The Topeka Water Supply Company and The Topeka Water Company, and each of them, hereby waive, release and relinquish, any and all rights of action they or any of them may have, if any, against the plaintiffs on the injunction bond given herein or otherwise, by reason of the complainants having sued out a temporary injunction in this cause.

"4. Nothing contained in this stipulation shall be construed in any way as an admission that complainants' bill was improperly brought for specific performance.

"5. Nothing contained in this stipulation shall enlarge or lessen, or in any manner affect the rights or remedies of complainants against Joab Mulvane in this suit or in any other action, except as contained in paragraph 2 hereof; NOR SHALL ANYTHING CONTAINED HEREIN ENLARGE OR LESSEN, OR IN ANY MANNER WHATEVER AFFECT THE RIGHTS OR REMEDIES OF JOAB MULVANE AGAINST COMPLAINANTS IN THIS OR ANY OTHER ACTION.

ROSSINGTON, SMITH & DALLAS,
Sol. for Complainants.

COFFIN & STANTON,
By Silas B. Jones, their Sol.

A. L. WILLIAMS,
J. D. MCFARLAND,
Sol. for The Topeka Water Supply Company and The Topeka Water Company, Defendants."

The case thereafter proceeded to trial, before Judge Riner, and was by him decided against the complainants on September 26, 1892, on the ground that they did not pay to Mr. Mulvane the sum of $60,000 as provided by the terms of the agreement of December 14, 1889 (p. 172 of "Exhibit A" to record). They thereupon appealed the case to the United States Circuit Court of Appeals, where, upon October 16, 1893, the decree of the lower court was affirmed. The decision of the Court of Appeals may be found on page 286 of the record. The substance of the decision was that Wescott and Hanson had not complied with the terms of the contract made with Mulvane; therefore that they were not entitled to a specific performance of it or to damages as for a breach of contract. The court also held that by withdrawing so much of the bill as prayed for a specific performance of the contract the complainants withdrew their prayer for an injunction, which was merely an incident to the prayer for specific performance, and that no question could thereafter be raised as to the propriety of the ruling of the lower court in dissolving the temporary injunction.

After all questions as to the correctness of the ruling dissolving the temporary injunction had

been set at rest by the stipulation waiving specific performance as just stated, and on November 5, 1892, the action at bar was brought by Joab Mulvane against A. J. Tullock and W. M. D. Lee, the parties who signed the injunction bond above referred to.

Mulvane was compelled to pay large sums of money in his endeavor to prevent the allowance of a temporary injunction and in afterwards procuring its dissolution. The details of these expenditures, and the items of damages claimed, are set forth in plaintiff's amended petition which may be found on page 257 of the record. These items may be summarized as follows:

1. Interest on the sum of $500,000 at 6 per cent per annum, from time injunction was granted until it was dissolved, this being the amount of money Mulvane was prevented from collecting by reason of the injunction	$ 4,500.00
2. Attorneys' fees in connection with the injunction part of the case	16,000.00
3. Various traveling expenses, telegrams, stenographer's fees, court costs, etc., caused by the injunction,	869.48
Total	$21,369.48

Interest at 6 per cent upon expenditures actually made, from time made until date of verdict, would

amount to more than $8,000, making the aggregate amount of plaintiff's claim, with interest, about $30,000.

Argument.

I.

The Allowance of Attorneys' Fees as Damages on Injunction Bonds Given in Federal Courts is Permissible Under the Laws of this State.

This proposition was exhaustively argued and decided in the affirmative when the case was here before. Further argument upon it seems unnecessary.

Counsel cite authorities to the effect that a federal court has the power either to assess the damages upon an injunction bond in the main suit, or to permit an action at law to be maintained for the purpose of ascertaining the damages. Conceding this to be the law, it in no wise affects the proposition that the measure of damages is to be determined by the law of the forum. That proposition is based upon the theory that the court has required the execution of a bond which *may* be enforced in a State court. If it is an instrument which may be sued on in a State tribunal, the law of that tri-

bunal necessarily governs as to the measure of damages.

No effort was made to have the damages assessed in the main action, nothing was done to restrain the prosecution of this case in the State court, nor was a petition for the removal of the case to the federal court filed. The jurisdiction of the State court to render judgment for damages upon the injunction bond has never been questioned. It had the unquestioned power to render judgment upon the bond and to determine the proper measure of damages.

II.

The Sufficiency of the Petition to Justify the Allowance of Attorneys' Fees, and the Amendment of the Petition.

It is urged that attorneys' fees were not recoverable as they were in the nature of special damages and were not specially declared on in the petition. The petition alleged that plaintiff had suffered damages caused by the issuance of the injunction, in the sum of $75,000, for which sum of money he prayed judgment. It was never attacked by motion, and under it plaintiff intro-

duced his testimony upon the first trial, in regard to the amounts paid by him for attorneys' fees and other expenses. The defendants were fully advised upon the second trial, therefore, as to the exact nature of the measure of damages claimed by plaintiff.

However, to save any question upon this part of the case, and in view of the fact that defendant had asked leave to amend his answer, plaintiff, immediately upon the filing of defendant's amendment, obtained leave and filed an amended petition, setting out in detail the damages claimed by him. This amendment may be found upon page 257 of the record. The court had the power to permit it to be made and there was no abuse of discretion in authorizing it to be done. Neither was there any abuse of discretion in refusing defendant a continuance upon the filing of the amendment. The continuance was requested as a matter of absolute right, without any showing, or anything to indicate that a postponement was necessary, other than the mere fact that the amendment had been made.

III.

This Action Was Not Prematurely Brought.

The temporary injunction was dissolved upon April 4, 1890. Upon October 7, 1890, complainants filed a stipulation withdrawing so much of their bill as sought a specific performance of the alleged contract between complainants and Joab Mulvane. Inasmuch as the injunction was only an incident to the relief of specific performance, the withdrawal of so much of the bill as sought a specific performance of the contract was a dismissal of the injunction proceedings, and the case thereafter proceeded solely as a suit for damages.

The court will observe in considering this matter that Joab Mulvane was not a party to this proceeding. He had nothing to do with it. The court will also bear in mind that the equitable relief desired could not be obtained without the presence of Woodbury and Moulton, who were held to be necessary parties. With Woodbury and Moulton in the case the court lost jurisdiction of it. So in order to keep the case in court at all it was necessary to dismiss the equitable part of

it and proceed with it as a suit for damages exclusively against Joab Mulvane.

Now, when the complainants voluntarily dismissed the case, as far as the injunction part of it was concerned, they could no longer litigate any question connected with the granting or dissolution of the injunction. The jurisdiction of the court was gone—that part of the case was finally ended.

In the case of *Mitchell vs. Sullivan*, 30 Kan. 231, it was held as follows:

"Where a plaintiff, on commencing a suit and obtaining a temporary injunction, gives an undertaking to secure to the party injured the damages he may sustain if it be finally decided that the injunction ought not to have been granted, and subsequently appears in court and dismisses the action without prejudice to a future action, and the court enters judgment dismissing the action, such judgment is equivalent to a final decision by the court that the plaintiff was not entitled to the temporary order of injunction, and after the judgment an action lies upon the injunction undertaking."

See, also:

Bell vs. Matthews, 37 Kan. 686.

Marbourg vs. Smith, 11 Kan. 562.

Kelley vs. Sage, 12 Kan. 109.

For decisions of other courts upon this subject, see:

Pugh's Adm'r vs. White, 78 Ky. 210.

Richardson vs. Allen, 74 Allen, 719.

Hibbard vs. McKindley, 28 Ill. 255.

DeBevard vs. Prial, 54 N. Y. S., 534.

Neusemond Timber Co. vs. Roundtree, 29 S. E. 61.

Dowling vs. Pollack, 18 Cal. 627.

The suit could proceed as one for damages without involving in any way the question as to whether plaintiffs were entitled to equitable relief. If plaintiff had recovered a judgment for damages, that would not have been equivalent to a finding that he was originally entitled to the issuance of a temporary injunction. In fact, one of the defenses urged against the granting of the injunction was the proposition that a suit for damages would have afforded plaintiffs a complete and ample remedy for the alleged wrongs of which they complained. After the injunction branch of the case had been dismissed the court no longer had any authority over it, and any proceedings of the court thereafter had, with respect to that phase of the litigation, would have been without jurisdiction and void. Such proceedings could be collaterally attacked, and would have no more force than a personal judgment rendered without service of summons upon the defendant.

But we are not compelled to rely upon the foregoing authorities to establish our contention that the dismissal of that part of the case calling for equitable relief amounted to a final determination of the question as to whether the injunction had been properly granted. It has been determined adverse to the claims of plaintiffs in error by the United States Circuit Court of Appeals in the case in which the injunction was granted and is *res judicata*. In regard to this matter the court uses the following language (see page 294 of record, and 58 Fed. Rep. page 308):

"It is assigned for error that the Circuit Court erred in dissolving the temporary injunction as well as in dismissing the bill on the ground heretofore stated. As the first of these assignments was somewhat pressed on the argument, it becomes necessary to say, and we think it all sufficient to say, that the appellants can not be heard to complain in this court of the order dissolving the temporary injunction, after voluntarily withdrawing so much of their bill as sought a specific performance of the alleged contract. An injunction could only be awarded as an incident to that species of equitable relief, and when the allegations and the prayer of the bill looking to that form of relief were withdrawn the injunction necessarily shared the same fate."

Counsel cite a number of authorities to show that questions connected with the granting and dissolving of injunctions are not finally determined

so long as an appeal is pending. We have no desire to take issue with these authorities. Our answer to them is that they do not apply to this case. If, after Judge Caldwell had dissolved the temporary injunction, the cause had proceeded in the usual course and an appeal had been taken to the Circuit Court of Appeals, then the point decided by these cases could have been properly raised.

But in this case plaintiffs voluntarily abandoned their injunction proceedings and the appeal thereafter taken by them related entirely to the branch of the case which had *not* been dismissed, and had nothing to do with the injunction proceedings.

IV.

There was no Error in Receiving Evidence of the Decision of the United States Circuit Court of Appeals.

But counsel say that the court erred in receiving in evidence the opinion of the Circuit Court of Appeals. This subject is treated of under their sixth assignment of error.

Their argument may be generalized as follows:

(*a*) It was improper to receive evidence as to

the decision of the Circuit Court of Appeals under any circumstances.

(*b*) It was particularly improper to receive such decision in evidence inasmuch as it was rendered after the commencement of this suit.

(*c*) The decision of the Circuit Court of Appeals was not properly provable by its opinion. We will treat of these points in their order.

(*a*) *It was proper to prove the decision of the Circuit Court of Appeals.*

In considering this question, we desire, first, to eliminate the objections which arise on account of the decision having been made subsequent to the commencement of the suit at bar, as well as the further objection that the opinion of the court is not proper evidence of what its decision was, so that we may determine at the outset whether the decision of the Court of Appeals was admissible in evidence under any circumstances.

For the purpose of obtaining a proper grasp of the point involved let us suppose that prior to the bringing of this suit the Circuit Court of Appeals had decided, 1, that all questions connected with the injunction part of the case had been finally disposed of on account of plaintiffs' voluntary withdrawal of so much of their cause as called for

equitable relief, and had therefore refused to consider them; 2, that the trial court had erred in refusing to admit testimony upon some question connected with the proper construction of the contract and had thereupon reversed the case and remanded it for further hearing upon the question of damages as in an ordinary law case.

Suppose that Joab Mulvane had then brought suit upon his bond, after the decision of the appellate court had become effective, and before a new trial upon the question of damages had been had in the federal court.

Under the foregoing circumstances can it be claimed that the decision of the Court of Appeals was not competent or relevant testimony in the suit upon the injunction bond, for the purpose of showing that all questions as to the propriety of issuing or dissolving the injunction had been finally determined?

There can be but one answer to this question.

In proving his case, under such a state of facts, plaintiff would have a right to show all the circumstances connected with the granting of the injunction, its dissolution, the dismissal of the injunction proceeding, and the decision of the Circuit Court of Appeals to the effect that the in-

junction branch of the case ended with its dismissal in the trial court. This would be the proof which a lawyer would ordinarily make under such circumstances. It might be objected to such evidence that as the record already showed the dismissal of the injunction proceedings by the plaintiffs, the court would declare as a matter of law that its effect was to finally determine all questions connected with the injunction part of the case, and that testimony to the effect that it had been judicially determined between the same parties that such was the effect of the dismissal would be unnecessary and immaterial. But such an objection would not be tenable. If there are two consistent theories upon which plaintiff may rely in support of his claim, there is no reason why he may not introduce testimony in support of both of them. If A should seek to put in judgment in Kansas a decree obtained against B in New York, B would have the right to show not only that the decree was void as a matter of law, because of a want of jurisdiction over him, but that the Court of Appeals of New York had subsequently so decided in the original suit.

A defendant in ejectment may prove, in support of his right of possession, not only instruments

purporting to convey the fee simple title to him, but also evidence showing adverse possession for more than fifteen years. These defenses are not inconsistent, and he would not be required to elect between them.

A defendant sued upon a written obligation would have the right to show that it was void upon its face as a matter of law, and in addition thereto that the question had already been decided in his favor by another tribunal, in a case where the parties and the issues were the same. He would not be compelled to elect between these two defenses but might rely upon both of them.

So in this case, plaintiff had the right to rely not only upon the legal proposition that the injunction part of the case was finally ended upon its dismissal, but upon the fact that the question was *res judicata*.

We now come to the inquiry as to whether or not the fact that the decision of the Circuit Court of Appeals was made subsequent to the beginning of this action affects the question of its admissibility as evidence.

(*b*) *The fact that the decision of the Court of*

Appeals was made after the beginning of this suit does not affect its admissibility.

The United States Circuit Court of Appeals did not decide that the Circuit Court was right in dissolving the injunction The appellate court held that it could not entertain or consider any questions connected with the propriety of allowing or dissolving the injunction, as these matters had been eliminated from the case by plaintiffs' voluntary action. It held that all matters pertaining to the injunction feature of the case had been finally disposed of by the dismissal of that part of the bill which prayed for equitable relief. The case of Mulvane against Tullock was not begun until long after the dismissal had become effective.

The decision of the Court of Appeals was admissible for the purpose of showing its adjudication as to the status of the case prior to the time this suit was brought. The decision did not confer any substantive rights upon Mulvane. It was merely declarative of the rights possessed by him when Wescott and Hanson dismissed their injunction proceedings. To illustrate: If, during the pendency of an ejectment suit, the defendant A purchases an outstanding title, he thereby becomes possessed of a new and substantive right, pending

the litigation. But if, while the case is pending, a final decision is made by another court, in an action between the same parties and involving the same issues, to the effect that A is, and at all times in question had been, the owner, and entitled to the possession of the land in controversy, there would be a case in which no new right was obtained by A as the result of the decision of the court, but merely a judicial declaration as to what his rights were at the beginning of the action. And it is plain to be seen that such decision could be used as evidence in support of A's defense even though it was rendered during the pendency of the case.

Decisions made in one case involving issues in other pending cases, so far as the point under discussion is concerned, are somewhat analogous to admissions made by a party during the pendency of litigation. If, while an action is pending between A and B as to the title to a piece of land, A admits that certain deeds upon which he relies are forgeries, there is no reason why these admissions are not admissible in evidence even though made long after the suit was commenced.

Let us examine some of the authorities bearing upon the point under consideration.

In the case of *Duden vs. Maloy*, 43 Fed. 407, it appears that in a suit in equity, pending in the federal court in New York, a question arose as to whether a certain factory business was or was not a partnership enterprise, and whether or not the lands, buildings and appurtenances thereof formed a part of the assets of a certain partnership. Testimony was taken before the master, who reported that the business was *not* a partnership enterprise, and that the property did not belong to the partnership. The court in which the master's report was filed stated that the master's finding seemed to be in accord with the weight of testimony which ordinarily would be sustained. Upon the hearing, however, of the exceptions to the master's report, the defendant presented a judgment of the supreme court of the State of New York, rendered *subsequent* to the filing of the master's report, in an action wherein the parties were the same. In that case the same issues were raised as those which were passed upon by the master. In the State court it was adjudged that the property *was* partnership property, which was in direct conflict with the finding of the master in the equity case. The federal court thereupon held that, notwithstanding the master's report to the

contrary, the decision of the State court was *res judicata* and must be followed by the court in which the master's report was filed.

The case of *Hatfield vs. Hatfield* is an instructive one upon this point. A synopsis of it can be found in 20 Howard's State Trials, 395. The following quotation is taken, however, from Van Fleet on Former Adjudication, page 5:

"A widow brought suit to recover a provision made for her by the will of her late husband, and the defense was that she was not his widow because she had formerly been married to one Porter, who was her lawful husband, and as such had released the provision. *While this suit was pending* she brought a suit of jactitation against Porter, who in collusion with her employed counsel to represent him, who let the matter go without counter proofs, and a sentence was rendered declaring her free from all contract with him, which was decided by the House of Lords to bar the defense."

In the case of *Bryar et al. vs. Bryar*, 78 Fed. 657, "the wife of a bankrupt brought a bill in equity in the United States District Court against the bankrupt and his assignee, claiming to be the equitable owner of the undivided one-half of land the legal title to which was in the bankrupt; C, the purchaser of the land at assignee's sale, intervened as defendant. There was a decree in favor of the wife, and an appeal therefrom to the United

States Circuit Court. *Pending this appeal* the wife brought ejectment in a court of the State (Pennsylvania) against C, upon the same equitable title which was the foundation of her pending bill. The ejectment was tried upon the merits, and resulted in a verdict and judgment against the wife. *Held*, that she and her heirs were thereby concluded in the pending suit in the Circuit Court."

In the case of *N. Y. N. H. & H. R. Co. vs. Cockroft et al.*, 49 Fed. 3 (Conn.), it appears that railroad companies before condemning additional lands for railroad purposes must get the consent of the railroad commissioners. An appeal lies from their decision and the appeal operates as a *supersedeas* of the order complained of. After the consent to condemn is obtained the amount of damages to be paid is ascertained on proceedings instituted before the judge of the superior court.

In the case cited the landowner appealed from the decision permitting the condemnation. Pending the appeal, the railroad company made application for the ascertainment of the damages. The defendants (landowners) removed the application to the federal court, and pleaded the appeal in abatement. When the plea was filed the appeal had not been determined. *It was afterwards held*,

by the highest court, that the appeal could not be entertained for want of jurisdiction. The court sustained a demurrer to the plea and overruled the contention of the defendant to the effect that the plea was to be considered as of the time it was filed, without regard to the subsequent decision of the superior court. In the course of the opinion the court say:

"The counsel for the defendants further insists that the fact of the appeal operated by force of the statute as a *supersedeas* of all further proceedings until final action of the court thereon; and that this proceeding for the ascertainment of the damages could not be had before then. The nature of the proceeding for an appeal is important here. No appeal is taken before, filed with, or allowed by, the railroad commissioners, and no removal of the proceedings before them or of their record is had. The application to the superior court is an independent proceeding, which operates upon the parties, and not upon the railroad commissioners nor their judgment, until the superior court acts. That court has not acted upon the appeal at all; but has merely held that there was none. If it had taken jurisdiction an appeal would have been pending; and, if sustained, its order, and not that of the railroad commissioners, would have been the foundation for further proceedings, if any were provided for. *But, as it took no jurisdiction whatever, the proceedings of the railroad commissioners were left in force as they had been all the while.* The statute does not provide that an attempted appeal, nor that the service of a citation on a petition for an appeal, shall operate as a *su-*

persedeas, but that such appeal—that is, an appeal in such a case—shall operate as a *supersedeas*. This is settled to be not such a case; therefore this was not such an appeal as the statute gave that effect to. Demurrer sustained, and plea adjudged insufficient."

In the case of *Wager vs. Providence Ins. Co.*, 150 U. S. 99, the insurance company brought an action against Henry Morse & Co. and Chas. E. Wager, whereby it sought to become subrogated to certain claims which other parties held against Morse & Co. and Wager as carriers. A decree was rendered against the respondents for a certain amount to be paid jointly and severally, and for a certain amount payable by Wager alone. An appeal was prosecuted by Wager to the United States Supreme Court. The Supreme Court decided that Wager's defense had been settled adversely to him by another case and that the decision in that case was *res judicata*. It appears that Wager had prosecuted an appeal in the other case (*The Sydney*) which appeal was pending *at the time Wager's answer was filed in the main case*. The Supreme Court took judicial notice of the fact, however, that it had dismissed the other case for want of jurisdiction. The language of the court is as follows:

"It can not be questioned that, in the present case, the Circuit Court could, and this court on appeal can, take notice of the former case in the southern district, because the proceedings and decree therein are set up at length in the answer of Wager in the present case. It is true that Wager alleges, in his answer, that he had prosecuted an appeal to the Supreme Court, *which was then pending*. But the record of that appeal shows that it was dismissed by this court for want of jurisdiction. (*The Sydney*, 139 U. S. 331.) We think, therefore, that the Circuit Court did not err in regarding Wager as having been concluded by the trial and decree in the former case, and in entering a final decree against him."

The dates in the case just referred to are as follows: The main case, *Insurance Co. vs. Morse and Wager*, was commenced in May, 1887, and was finally decided by the Supreme Court November 6, 1893. The decision of the Supreme Court in the case of *The Sydney* was made March 30, 1891. Thus in a case brought in May, 1887, the United States Supreme Court took judicial notice of a decision of their own court made nearly four years after the bringing of the suit, for the purpose of applying the doctrine of *res judicata*.

The case of *David Bradley Mfg. Co. vs. Eagle Mfg. Co.*, 57 Fed. 980, was an action for an injunction to restrain infringement of a patent. The complainant offered in evidence the decree of

another court, to which defendant objected upon the ground that such decree was interlocutory only at the time of the bringing of the main suit, and therefore was not *res judicata*. The court said:

"That the decree was interlocutory at the bringing of this suit, and subsequently ripened into a final decree, does not impair its efficiency or conclusiveness when properly presented in this suit. The relative time of institution of suit, or the relative date of final decree, is not of consequence if the merits of the controversy be thereby fully and finally determined, and the record thereof is properly brought to the attention of the court. (*Duffy vs. Lytle*, 5 Watts, 120; *Casebeer vs. Mowry*, 55 Pa. St. 422; *Child vs. Powder Works*, 45 N. H. 547.)"

In *Duffy vs. Lytle*, 5 Watts, 120, it was held as follows:

"A prior judgment upon the same cause of action sustains the plea of a former recovery, although the judgment is in an action commenced subsequently to the one in which it was pleaded."

In *Casebeer vs. Mowry*, 55 Pa. St. 419, the court decided that—

"A verdict was given for the plaintiff in an action for flooding his land; there was a motion for a new trial, pending which another action was brought for the same nuisance. Before the trial a new trial was refused and judgment entered in the first suit. The court charged that this was

not conclusive on the defendant, because it did not exist when the suit was brought. *Held*, to be error.

"The date is of no consequence; it is the fact of an adjudication on the same subject-matter between the same parties which gives effect to the former recovery."

Lewis P. Childs vs. Eureka Powder Works, 45 N. H. 547.

In the case of *Simpson et al. vs. Voss*, 31 Kan. 227, suit was brought for the wrongful seizure and conversion of personal property. The defendant, a United States marshal, attempted to justify under an order of attachment directed to him. Subsequent to the filing of the reply in the case the court granting the order of attachment, upon motion, discharged the attachment proceedings. Thereafter the plaintiff, with leave of the court, filed an amended or supplemental reply, setting up the dissolution of the attachment. *Held*, that the court committed no error in allowing the reply to be filed, as it alleged facts material to the case occurring after the former reply. The court say:

"The discharge of the attachment related back to the issuance of the order of attachment, and swept away the defense that by virtue of the attachment proceedings the defendants below officially took possession of the property claimed.

After the attachment was dissolved, they could not justify thereunder."

Hentig vs. Redden, 46 Kan. 231.

Peterson vs. Albach, 51 Kan. 150.

McPheeters vs. Birk, 48 Kan. 784, 787.

We quote from the opinion of the court in that case:

"It is insisted by the defendant in error that any fact, to be pleaded in estoppel, must have existed at the time the plaintiff commenced his action; that nothing that arose subsequently could be pleaded in estoppel of the right of the defendant to defend against such action. This position is untenable under our Code of Procedure, which expressly authorizes supplemental pleadings to be filed, alleging facts material to the case occurring after the filing of the former petition, answer or reply. (Civil Code, Sec. 144.)"

Not Necessary to Specially Plead the Decision.

The supplemental pleadings provided for in our Code are in the nature of the old plea of *puis darrein continuance*, which provides for the setting up of matters in bar or abatement which had happened since the last continuance of the case.

In the case at bar it was not necessary for plaintiff to specially set up the decision of the Circuit Court of Appeals, because the decision was mere matter of evidence. Plaintiff pleaded in his

petition that there had been a final adjudication of the questions relating to the injunction, and in support of that allegation he offered *as evidence* the decision of the United States Circuit Court of Appeals. That decision did not hold that the injunction was improperly allowed or properly dissolved, but determined the effect of complainants' action in dismissing the injunction part of the case. Plaintiff introduced in evidence the stipulation filed by Wescott and Hanson dismissing the injunction proceedings; as additional evidence he offered the decision of the Court of Appeals, the effect of which was that the injunction proceedings in the case were finally ended upon the dismissal made by Wescott and Hanson, and that the Court of Appeals could not thereafter entertain an appeal growing out of those injunction proceedings, and could not determine whether the injunction was properly dissolved or not.

In the case of *Krekeler vs. Ritter*, 62 N. Y. 372, defendant's counsel offered in evidence upon the trial the judgment of another court. Plaintiff objected on the ground that it had not been set up in the answer or by supplemental answer. The objection was overruled. The Court of Appeals of New York held as follows:

"The record of the superior court was not offered or received in evidence in bar of the action, but merely as evidence of the fact in issue. Had it been offered as constituting a bar, or as an estoppel to the action, it would have been inadmissible, not having been pleaded as a defense. * * * But as evidence of a fact in issue it was competent although not pleaded, like any other evidence, whether documentary or oral. A party is never required to disclose his evidence by his pleadings. The evidence was competent to disprove a material allegation of the complaint traversed by the answer. As evidence it was conclusive as an adjudication of the same fact, in an action between the same parties. (*Wright vs. Butler*, 6 Wend. 284; *Lawrence vs. Hunt*, 10 Id. 81; *Embury vs. Connor*, 3 Comst. 511; *Gardner vs. Buckbee*, 3 Cow. 120.) The court properly held that the matter adjudicated between the parties in another action might be given in evidence."

In the case of *Gardner vs. Buckbee*, 3 Cow. 120, it was held that—

"The judgment of a court of concurrent jurisdiction, directly upon a point, is conclusive between the same parties, upon the same matter coming directly in question in another suit.

"And this, whether it be pleaded, or given in evidence under the general issue.

"It is conclusive, whether it appears, upon the face of the record in the former suit, that the same matter was tried and passed upon, or not.

"If it was, in fact, so tried, without this fact appearing of record, the proper course is to give the record in evidence, and then prove, by parol, that the matter did arise, and was tried upon the pleadings in the record."

In the case of *Insurance Co. vs. Harris*, 97 U. S. 331, 336, the lower court had refused to receive in evidence, as *res judicata*, a judgment of another court. With reference to this matter the Supreme Court of the United States said:

"If, then, the record of the decrees of the New York court was pertinent to the issue in the case in the Circuit Court, as we have seen it was, and was material, why should it not have been received? There was nothing in the pleadings, nor in the agreement of the parties, we think, that stood in the way of its admission. *The defendant below, now plaintiff in error, had pleaded the general issue, and under that, in assumpsit, a judgment recovered may be given in evidence.* (2 Stra. 733; 1 Saund., Williams' notes, 67 *a*; *Stafford vs. Clark*, 2 Bing. 377; *Young vs. Black*, 7 Cranch. 565.)"

Vol. 21 Am. & Eng. Enc. of Law, p. 258.

(*c*) *The opinion of the United States Circuit Court of Appeals was admissible in evidence to show what the decision of the court actually was.*

The mandate of the United States Circuit Court of Appeals merely shows that the decree of the lower court was affirmed. There was no possible way of determining its decision as to the finality of the injunction proceedings, except by reference to its opinion.

It is well settled law that the judge's public

rulings can be offered in evidence to determine what issues were passed upon.

Van Fleet on Former Adjudication, page 843.

To put it in another way, parol evidence is admissible for the purpose of showing the exact point passed upon by the court.

Black on Judgments, vol. 2, sections 623, 624, states the law upon this subject and cites many authorities:

"Sec. 623. It has been held in a few cases (principally very early decisions) that the record of a judgment in a former suit between the same parties, to constitute an estoppel, must show that the same subject-matter had been passed upon and adjudicated in that suit. In other words, that an estoppel can not be created by parol evidence helping out a record; but to constitute an estoppel by a former judgment, the precise point which is to create the estoppel must have been put in issue and decided, and that it was so put in issue and decided can appear by the record alone. But this doctrine, so far as concerns the kind of evidence admissible to identify the points adjudicated, is now generally repudiated.

"Sec. 624. It is now fully settled upon the authorities that extrinsic evidence, when not inconsistent with the record and not impugning its verity, is admissible for the purpose of identifying the points litigated and decided in a former action between the same parties, when the judgment therein is set up as a bar or estoppel in the case on trial. That is, 'it is not necessary as between parties and privies that the record should show the question upon which the right of the plaintiff to recover or

the validity of the defense depended, for it to operate conclusively; but only that the same matter in controversy might have been litigated, and extrinsic evidence would be admitted to prove that the particular question was material and was in fact contested, and that it was referred to the decision of the jury.' The ancient rule must therefore be regarded as modified by the later decisions so as to assume the following form: The record must show that the same matter *might* have come in question on the former trial, and then the fact that it *did* come in question may be shown by extrinsic proof. For example: where, in an action of ejectment, the defendant, to defeat the action, introduced and read in evidence the record of a judgment in a former action of ejectment between the same parties for the same premises, by which it appeared that a verdict was rendered for the defendant and a judgment entered thereon, it was held that the plaintiff might prove by a person present what title the defendant set up and established on the former trial, and on what questions the suit was litigated and decided, those facts not appearing by the record.

"Further, if the record is silent or ambiguous, as to the points at issue and the grounds of the decision, parol evidence is not only *competent* to identify the questions adjudged, but it may become *necessary* in order to insure the effect of the judgment as an estoppel. 'If it appear that several distinct matters may have been litigated upon one or more of which the judgment was rendered, the whole subject-matter of the action will be at large and open to a new contention, unless the uncertainty be removed by extrinsic evidence showing the precise point involved and determined.' A good illustration of this rule is found in the case of *McDowell vs. Langdon*, where it was held that a

verdict and judgment for the defendants, in an action at law for obstructing the flow of water to the plaintiff's mill, on a plea of not guilty, and a specification of defense denying both the plaintiff's right and any injury thereof, were no bar to a suit in equity to restrain such obstruction, where, upon the record of the former action, it was doubtful (and was not shown by extrinsic evidence), whether the defendants in that case prevailed on the ground that they had the right which they claimed in their specification of defense, or on the ground that they had done no acts in violation of the plaintiff's rights."

See, also:

Campbell vs. Rankin, 99 U. S. 261, 263.

Cromwell vs. Sack, 94 U. S. 352.

Miles vs. Caldwell, 2 Wallace, 35.

Packet Co. vs. Sickles, 5 Wallace, 580.

Davis vs. Brown, 94 U. S. 423.

Russell vs. Place, 94 U. S. 606.

Perkins vs. Parker, 10 Allen, 22.

Monroe vs. Meech, 94 Mich. 596; 54 N.W. 290.

Estele vs. Taul, 2 Yerg. 466.

Sanderson vs. Peabody, 58 N. H. 116, 118.

Gilbert vs. Earle, 47 Vt. 9.

Carmany vs. Hoober, 5 Pa. St. 305.

Smith vs. Auld, 31 Kan. 266.

Scott vs. Wagner, 2 Kan. App. 386.

Even Though Improperly Admitted in Evidence, the Opinion of the Circuit Court of Appeals Could Not Have Operated to the Prejudice of the Defendant.

The opinion in question was brief and contained nothing that could have prejudiced Mr. Tullock in the trial of this case. It recited the undisputed facts in the case—facts shown by the testimony of Wescott and Hanson, and declared that under them complainants were entitled to no damages. The court then proceeded to hold that it could not pass upon any of the questions involved in the granting and dissolution of the injunction, as that part of the case had been voluntarily dismissed by the complainants.

Judge Riner decided that complainants were entitled to no damages upon the merits of the case, and that fact was shown by the printed record about which there is no controversy. Judge Riner's opinion was very similar to that of the Court of Appeals. The appellate court simply affirmed his decision and recited the substance of complainant's own testimony in support of its conclusion. Its determination in regard to the finality

of the injunction proceedings differs in no wise from the instructions given by Judge Hazen.

Practically the only question which the jury had to pass upon in this case was the measure of damages, and we can not perceive how the opinion of the Circuit Court of Appeals could have had an effect upon the jury prejudicial to the rights of the defendant, in determining the amount of damages plaintiff was entitled to recover.

Statements are made in the brief of plaintiff in error as to the unfair and improper arguments to the jury made by counsel for plaintiff below, based upon this opinion. The only foundation for such statements is the following paragraph found on page 318 of the record. It reads as follows:

"In the closing argument before the jury, Mr. A. L. Williams, one of plaintiff's attorneys, referred to, explained and discussed the opinion of the United States Circuit Court of Appeals, rendered in the case of *Wescott and Hanson vs. Mulvane*, which had been admitted in evidence, and contended that said suit had been maliciously brought, and without probable cause therefor."

From the foregoing it is impossible to determine the nature of the remarks made by counsel in regard to this opinion. If prejudicial they should have been placed in the record or the substance of them given. No exceptions were taken to the

arguments and no affidavits filed giving any portion of the alleged unfair statements made by the attorneys for plaintiff to the jury.

The record does not state that it was argued to the jury that the opinion of the Circuit Court of Appeals showed that the cause of Wescott and Hanson against Mulvane was maliciously brought and without probable cause. The record states that such argument was made, but it negatives the idea that it was based upon the opinion of the Court of Appeals. As a matter of fact, this argument was founded solely upon the theory of defense advanced by adverse counsel during the trial of the case as shown by the questions propounded by them to the witnesses and their argument to the jury.

Their questions assumed that the services rendered by Mulvane's attorneys were not valuable, because the point upon which the injunction was dissolved was so simple that all lawyers ought to understand it. That it took no skill to convince a court that when a necessary party defendant was a citizen of the same State as one of the plaintiffs, that the federal court had no jurisdiction of the cause. We will quote one or two of their questions to witnesses upon this point:

McFARLAND, 250. "Q. The only question involved was as to the necessary parties, and if the court should have found that fact to exist, then you know and everybody else knows and as [all] lawyers know, that the federal court has not jurisdiction between citizens of the same State."

MULVANE, 159. "Q. All you had to do, as it turned out, was to go into court and suggest that there was an undisclosed principal by the name of Woodbury and Moulton who participated in this contract that you made with Coffin and Stanton, and as soon as the court's attention was called to that fact, by reason of Woodbury and Moulton being citizens of the same State with one of the plaintiffs, that is, of the same State with Mr. Wescott, of course the federal court understood it did not have jurisdiction and dissolved the injunction? That was all there was to it, wasn't there?"

A. A. HURD, 196. "Q. You knew as counsel for the defendant that Woodbury and Moulton were joint parties with Coffin and Stanton to this contract, and you knew Mr. Woodbury was a citizen of the State of Maine, being a citizen of the same State as one of the complainants in this case. You knew that fact?

A. Yes, sir.

(197) Q. Well, knowing that fact then, didn't you know that upon that fact being brought to the attention of the federal court that that court would say: 'This court is without jurisdiction,' and as a matter of course dissolve the injunction?"

Now the record shows that on February 24, 1890 (P. 43, "Exhibit A.") Woodbury and Moulton filed a motion supported by affidavits, contending

that they were necessary and indispensable parties defendant in the cause and praying the court to permit them to be made defendants. This request was resisted by Wescott and Hanson and the motion of Woodbury and Moulton overruled. That the matter was discussed at the time the application for temporary injunction was being heard is shown by the remarks made by Judge Foster found on page 75 of "Exhibit A." Motions were afterwards made to dissolve the injunction, and one of the grounds given for the dissolution was that Woodbury and Moulton, who were indispensable parties defendant, were citizens of the same State as one of the complainants, and therefore the court had no jurisdiction of the case. In short, counsel for Wescott and Hanson, who thoroughly understood the position of the defendants growing out of the citizenship of Woodbury and Moulton, opposed the dissolution of the temporary injunction and kept Mulvane tied up just as long as it was possible to do so. They knew he was straining every nerve to untangle himself so that he might carry out his contract with Coffin and Stanton and Woodbury and Moulton; they knew that bankruptcy threatened him and that it was the result of the injunction which tied up a

transaction involving half a million dollars; yet they insisted upon the allowance of the temporary injunction, resisted its dissolution, and held on to their advantage as long as they could. The injunction was in force from February 5 until April 4.

Now, if *any* lawyer would have known that the court was without jurisdiction of the case, and had no legal power or authority to grant an injunction, it goes without saying that lawyers of the eminence and ability of those who represented Wescott and Hanson *must* have known it. And if they knew it, was it not the quintessence of malice to keep Mr. Mulvane tied up by an injunction illegally granted and kept in force without authority of law?

This was the basis for the argument that the prosecution of the injunction suit against Mulvane was malicious, and not the opinion of the Court of Appeals.

V.

The Happening of the Condition upon which Liability Under the Bond Depended.

The condition upon which the liability on the injunction bond depended took effect when the injunction proceedings were dismissed. Under their

fourth specification of error counsel for plaintiff in error argues that the condition of the bond was that Tullock should become liable when it was *finally decided* that the injunction was improperly granted; that as the injunction proceedings were dismissed it left no opportunity for the court to finally determine the propriety of granting the injunction in the first place, and therefore that the condition in the bond upon which liability depended never happened. A number of authorities are cited in support of this contention.

Whatever the law may be in other jurisdictions, it is settled in the State of Kansas, as well as in other States, that when a surety goes upon an injunction bond conditioned for the payment of all damages which the defendant may sustain if it be *finally determined* that the injunction was improperly granted, he is liable for the damages sustained by the defendant if the injunction proceedings are dismissed. In other words, the dismissal of the injunction proceedings is equivalent to a final determination by the court that the temporary injunction was improvidently granted. We have already quoted the syllabus in the case of *Mitchell vs. Sullivan*, 30 Kan. 231, but it is so

directly applicable to this point that we will quote it again. It reads as follows:

"Where a plaintiff, on commencing a suit and obtaining a temporary injunction, gives an undertaking to secure to the party injured the damages he may sustain if it be finally decided that the injunction ought not to have been granted, and subsequently appears in court and dismisses the action without prejudice to a future action, and the court enters judgment dismissing the action, such judgment is equivalent to a final decision by the court that the plaintiff was not entitled to the temporary injunction, and after the judgment an action lies upon the injunction undertaking."

It is unnecessary to refer to similar authorities from other States bearing upon this point, inasmuch as we have given them in another part of this brief, in support of the proposition that the action was not prematurely brought.

When Tullock signed the injunction bond he knew that the temporary injunction had been dissolved; that the court had decided that it was without jurisdiction of the cause, and that he was responsible for all damages which the defendants had, or might sustain, by reason of the granting of the injunction. He also knew that it was within the power of the complainant to dismiss the injunction proceedings and that this was equivalent

to the final determination of the cause referred to in the bond signed by him.

If the contention of counsel were correct, then no damages could ever be recovered upon an injunction bond after a temporary injunction had been issued and afterwards dissolved, provided the plaintiff dismissed his case before its final termination. In that way parties could tie up the business affairs of others for an indefinite period, find out the probable result of the injunction proceedings, and if unfavorable, escape all liability upon the injunction bond by dismissing the case. A bare statement of the proposition is sufficient to show its absurdity.

VI.

Apportionment of Attorneys' Fees.

Under the 5th assignment of error it is urged that there was a total failure to apportion the attorneys' fees, and that Mulvane therefore could not recover any such fees.

It is claimed that there was a failure to separate the charges paid for services upon the merits of the case from those rendered in connection with the injunction proceedings; also that there was a

failure to apportion the fees paid for the services rendered to Mr. Mulvane from those rendered to the other defendants.

Let us consider these objections.

The case was tried by the plaintiff upon the theory that he was only entitled to recover the attorneys' fees paid by him for services rendered in connection with the injunction part of the case. He claimed nothing more and his testimony was introduced in accordance with this idea. To make this plain we will quote some of the testimony in the case:

Joab Mulvane: (p. 177.) "Q. You said in answer to a question propounded by Mr. Smith that you wanted to defend the suit generally. Who did you employ for the purpose of representing you on the merits of the case for the purpose of defending the suit generally?

A. Mr. A. L. Williams.

Q. Was he the only one?

A. Yes, sir; on the merits of the case generally. The employment of all the other attorneys except Mr. Williams was in the preliminary, or in the matter involved in the injunction, and when that was accomplished I employed Mr. Williams, as the suit was retained, a suit for damages, against me on the part of the plaintiffs. I employed Mr. Williams to go on with the suit as to its merits; and he is the only one."

(P. 173.) "Q. Were any of the attorneys other than Mr. Willliams employed to represent you on the merits of the case?

A. No, sir.

Q. Did they appear in the case after the disposition of the injunction?

A. No, sir; not to my knowledge.

Q. Did they charge you for any services after the temporary injunction was dissolved or for anything other than services connected with the injunction?

A. No, sir; the amounts paid them was solely for the injunction."

See, also, pages 122, 123, 125, 127, 128, 129, 130.

A. A. HURD: (p. 184.) "Q. State whether or not you and Mr. Dunlap were employed by Mr. Joab Mulvane in the case of Wescott and Hanson against Mulvane and others pending in the United States Circuit Court for the District of Kansas.

A. We were.

Q. State for what Mr. Mulvane employed you gentlemen in that case.

A. To assist in getting rid of the temporary injunction which had been granted in the federal court to restrain him from turning over the stock of The Topeka Water Works Company to the firm of Coffin and Stanton in New York, to whom he had contracted to sell and deliver it.

Q. Did Mr. Mulvane employ you to represent him on the merits of the case outside of the injunction matters?

A. Why, no, sir; not at that time. The object of the employment was wholly to get rid of the temporary injunction.

Q. After the injunction was got rid of, who continued in charge of the case?

A. I don't know. I quit it after that; did not have anything to do with it after that.

Q. Is that true of Mr. Dunlap, also?

A. I think so; yes, sir. If we rendered any services it was something very slight, something we never made any charge for. We might have done some little thing after the order was made by Judge Caldwell, dissolving the temporary injunction, but never made any charge for it.

Q. Then the charge which you and Mr. Dunlap made was for services exclusively in connection with the injunction proceedings in the case?

A. Yes, sir; in connection with the dissolution of the temporary injunction."

A. L. WILLIAMS: (p. 253.) "I was employed by Mr. Joab Mulvane in the case of *Wescott and Hanson vs. Joab Mulvane et al.*, pending in the Circuit Court of the United States for the District of Kansas, to assist in procuring a dissolution of the temporary injunction against Mr. Mulvane in that case. In pursuance of that employment I, together with other attorneys, appeared for and represented Mr. Mulvane, and succeeded in obtaining a dissolution of the injunction. For the services rendered by me to Mr. Mulvane in procuring the dissolution of the temporary injunction in that case, and for no other services, I charged Mr. Mulvane $3,000, which amount he paid me. I also represented Mr. Mulvane upon the merits of the case, but charged a separate fee therefor, which had nothing to do with the services rendered in connection with the temporary injunction. In my opinion the fee charged by me in procuring a dissolution of the temporary injunction was a reasonable fee for the services performed."

See, also, testimony of Eugene Hagan, pages 238 and 239, and of J. D. McFarland, pages 248 and 249.

It thus appears that the attorneys' fees for which we prayed judgment were all paid for services rendered in connection with the injunction proceedings exclusively. The fee paid A. L. Williams for his services upon the merits of the case is not included in our estimate of damages.

But counsel say that the record shows that answers and pleas were filed by Mulvane's attorneys, and that these pleadings were necessarily related to the merits of the case; also that a couple of papers which were filed in the case after the injunction was disposed of were signed by some of the attorneys other than Mr. Williams.

As to the answers and pleas, it is apparent that it was perfectly proper to file them for the sole purpose of aiding in the dissolution of the temporary injunction. The testimony shows that Mulvane's attorneys considered it a wise thing to do (pp. 190, 191), and no careful lawyer would undertake to contradict them. The court will also note that had it not been for the pleadings filed in the case Judge Caldwell might not have assumed jurisdiction of it. His reason for doing so appears in the order dissolving the injunction, in the following language:

"And it further appearing that the court grant-

ing the temporary injunction postponed the consideration and decision of this question until the coming in of the pleadings and proofs now before me on that subject." (See page 88 of "Exhibit A.")

As to any paper placed on file with the signatures of these attorneys after the dissolution of the injunction, it appears that no charge was made or ever would be made for anything done in connection with those papers. The charges were only intended to cover services relating to the injunction part of the case.

But it was not necessary to have the attorneys who testified upon this subject go into these details in order to lay the foundation for a verdict covering the value of their services. In making their objections counsel lose sight of the fundamental principles governing the allowance of attorneys' fees under such circumstances. The instructions of the court upon the point that fees were only to be allowed for services in connection with the injunction are clear and explicit, and no complaint is made of them upon that score. (See instructions numbered 7, 8, 9 and 10, pp. 313, 314.)

The record shows the exact amount of work done by the attorneys in the case. Every paper on file and every step taken in the case is shown

in the printed record filed in the Circuit Court of Appeals, which is attached to the case-made in this case. That record is supplemented by the oral testimony taken in court detailing the amount and nature of the work done by Mr. Mulvane's attorneys.

Now, without the testimony of a single witness as to the value of attorneys' fees, the jury had the power to determine from the record just what they would allow Mr. Mulvane for the fees paid by him, in connection with the injunction part of the case. They had the right to take the testimony of the lawyers and experts for what it was worth and to believe as much of it as they saw fit. They could disregard all such testimony and base their judgment upon the work actually done, in accordance with their own views as to what such work was worth. If the witnesses did not properly apportion the fees, the jury could do so. They had all the facts before them, as well as the instructions of the court, and that was sufficient. If in their opinion the value of the services for preparing the answers and pleas should have been apportioned between the case on its merits and the injunction proceedings, it was their duty to make the apportionment, and having the instruc-

tions before them and all the facts, the presumption is that they did so.

The law upon this subject is well settled in Kansas and we will call attention to the cases.

In the case of *Anthony vs. Stinson*, 4 Kan. 221, the opinion of the court upon this subject reads as follows:

"IV. Certain lawyers having testified as to the value of the legal services rendered by the plaintiffs, the court instructed the jury that '*Such witnesses* are supposed to be better qualified to put a value upon such services than the jury, none of whom may have any personal knowledge of the nature of the business in which they have been performed. *Such testimony is the guide of the jury* in finding the amount justly due, and in this case you must take the testimony of these witnesses, and be governed by it, in finding the value of the services rendered by Stinson & Hurd.'

"We do not so understand the law of jury trials. It is not for the court to instruct the jury as to what part of the testimony before them shall control their verdict, but the *jury* must weigh all the testimony before them, decide as to its credibility, and as to the weight which should be given to it in making up the verdict. The testimony of *experts* or professional witnesses is often very important, and justly entitled to great weight in a cause; but it must have its legitimate influence by enlightening, convincing and governing the judgment of the jury, and must be of such a character as to outweigh, by its intrinsic force and probability, all conflicting testimony. The jury can not be required by the court to accept, as matter of law, the *conclusions* of the witnesses instead of

their own; and we think the court below erred in this part of its charge. Nor was this error cured when, upon the request of the defendant's counsel, that the court should instruct the jury 'that they should not be governed *alone* by the evidence of the witnesses offered to prove the value of the services, but that they should also take into consideration all the circumstances of the case, and all the surroundings, such as the character of the cases in which they were performed, the time employed, etc., the court responded that all the circumstances were before the jury, and were to be considered by them; and that, in the instructions given the jury, it was only intended to charge them that, in finding the value of the services rendered, *they must not consider their judgment better than the judgment of the witnesses who had testified as to their value.*

"This language seems to be a repetition in substance of the former charge which we have commented on as objectionable. Its obvious import is that the jury are to pay particular and special deference to the statements of the legal gentlemen who gave testimony as to the value of the legal services, or, in effect, to accept the *conclusions* of those gentlemen as their own. It substitutes the judgment of the witnesses for the judgment of the individual jurors; while the true theory of jury trials regards the opinion of such witnesses as *facts*, to be considered and weighed like other facts and circumstances of the case. Thus, if Attorney A testified that the services rendered were, in his judgment, worth $1,000, and Attorney B swore he considered them worth only $50, while it appeared from other testimony that the services required but a moderate expenditure of time and effort, we think that an unprofessional juryman should take the fact that Lawyers A and

B swore as they did, and compare that fact with the time spent and the other circumstances proved, tending to fix the value, and make up *his own* judgment.

But under the instructions given in this case, jurors would not have felt themselves at liberty, we apprehend, to do this, and consequently, in rendering their verdict, they may be regarded as registering the opinion of the professional witnesses rather than their own."

In the case of *Missouri River R. R. Co. vs. Richards*, 8 Kan. 101, a question arose in regard to the value of the services of a clerk of a corporation. In commenting upon the instructions this court, through Mr. Justice Kingman, used the following language:

(P. 110.) "A part of the charge to which objection is made is this: 'The jury can take into consideration their own general knowledge in assessing plaintiff's damages.' The jury are always in a case, as we understand the law, to use the knowledge and experience they are supposed to possess in common with the generality of mankind in making up a verdict. As we understand it, this instruction goes no farther than this. On questions of damages, the exercise of this power is frequently one of the means of coming to a conclusion. Where witnesses are supposed to have a peculiar skill and judgment, upon a particular subject their opinions as to the amount of damages are sometimes allowed to go to a jury for the purpose of supplying the supposed want of experience and knowledge of the jury. *Where such witnesses are not produced the jury must use their own judgment.* We do not know of a

single decision against this doctrine. It is not the knowledge that the jury have of this particular case that they are permitted by the court to apply, but that general knowledge they have in common with the rest of mankind. (See 1 Greenl. on Ev. sec. 364, note, and authorities referred to; *Chicago vs. Mayor*, 18 Ill. 360; *State vs. Barrow*, 37 Vt. 62, where the court held that a jury might take into consideration their general knowledge that ale was an intoxicating liquor; *Parker vs. Boston*, 15 Pick. 209; *Murdock vs. Summer*, 22 Pick. 158.) 'That general knowledge that a man can bring to the subject a juror may use, but if he has any particular knowledge on the trade he must be sworn.' (32 Eng. Com. Law, 670.) The instruction under consideration goes no further."

The same point was before this court in the case of *Bentley et al. vs. Brown*, 37 Kan. 14, and the court, through Mr. Justice Johnston, declared the law to be as follows:

"The complaint of the plaintiffs in error is, that the court disregarded the testimony in the findings which it made. There was a long list of charges for legal services which ran through a period of about two years, upon each of which the court found specially as to the nature and extent of the services rendered, and the value of the same. Several attorneys were called, who testified as experts in regard to the value of the services rendered, and it is now contended that the court erred in placing a lower estimate upon the value of the services than was done by the professional witnesses produced by the plaintiffs in error. The judge or jury trying the question of the value of professional services is not bound to accept as conclusive the opinions of the professional witnesses.

In this case there was considerable testimony produced besides the opinions of the experts; and their opinions respecting the value of the services were not at all harmonious. *There were before the court the terms of employment, the character of the litigation in which the services were rendered, the manner in which the services were performed, and the benefits resulting to the defendant in error from the services. It was the duty of the court to consider all these matters in determining the value of the services.* The court could not abdicate the duty of exercising its own judgment, and blindly accept the judgment of the experts. The opinions of professional men, who are conversant with the nature and value of legal services, are entitled to great weight, but such opinions are not binding or conclusive. They should be considered in connection with all the other testimony and circumstances of the case; and the court or jury trying the fact must not only weigh the conflicting opinions of the witnesses, but must use and apply its own general knowledge and judgment in the light of the testimony, to determine the value of the services. (*Anthony vs. Stinson*, 4 Kan. 211; *Head vs. Hargrave*, 105 U. S. 45; *Rose vs. Spies*, 44 Mo. 20.)"

In the case of *Head vs. Hargrave*, 105 U. S. 49, Mr. Justice Field, who delivered the opinion of the court, used the following language:

"It was the province of the jury to weigh the testimony of the attorneys as to the value of the services *by reference to their nature, the time occupied in their performance, and other attending circumstances, and by applying it to their own*

experience and knowledge of the character of such services. To direct them to find the value of the services from the testimony of the experts alone, was to say to them that the issue should be determined by the opinions of the attorneys, and not by the exercise of their own judgment *of the facts on which those opinions were given.* The evidence of experts as to the value of professional services does not differ, in principle, from such evidence as to the value of labor in other departments of business, or as to the value of property. So far from laying aside their own general knowledge and ideas, the jury should have applied that knowledge and those ideas to the matters of fact in evidence in determining the weight to be given to the opinions expressed; and it was only in that way that they could arrive at a just conclusion. While they can not act in any case upon particular facts material to its disposition resting in their private knowledge, but should be governed by the evidence adduced, they may, and to act intelligently they must, judge of the weight and force of that evidence by their own general knowledge of the subject of inquiry. If, for example, the question were as to the damages sustained by a plaintiff from a fracture of his leg by the carelessness of a defendant, the jury would ill perform their duty and probably come to a wrong conclusion, if, controlled by the testimony of the surgeons, not merely as to the injury inflicted but as to the damages sustained, they should ignore their own knowledge and experience of the value of a sound limb. Other persons besides professional men have knowledge of the value of professional services; and, while great weight should always be given to the opinions of those familiar with the subject, they are not to be blindly received, but are to be intelligently examined by the jury in the

light of their own general knowledge; they should control only as they are found to be reasonable."

As to the services rendered the other defendants the instructions of the court are very explicit. They read as follows:

"15. It is claimed on behalf of defendant in this case that in the injunction suit in the federal court there was a number of defendants besides the defendant Mulvane; that all of the defendants in said suit except the defendant Mulvane released the defendant in this suit from any liability to them growing out of the granting of the temporary injunction. And it is further claimed that the services rendered by the attorneys representing the defendants in the injunction suit were employed to and did represent all of said defendants and that the amounts paid by Mulvane were paid on account of and for services rendered for all of the defendants in the injunction suit.

"16. The evidence in this case shows that all of the other defendants in the injunction suit have released all claims for damages growing out of the granting of said injunction, and therefore I instruct you that Mulvane could not recover in this action for any money paid out on account of services rendered for the other defendants in said suit. Mulvane must be confined in this action, and can only recover for money paid out on account of services performed for him, and can not recover for money paid to attorneys for services performed by them for other of the defendants in the injunction suit."

Plaintiff in error can find no fault with these instructions. They are as strong as he could have desired. If the jury were of the opinion, under

the testimony, that a portion of the fees charged by Mulvane's attorneys were fees which they could have properly charged against other defendants, the jury had sufficient data before them to enable them to deduct the fees thus chargeable to other defendants from the amounts paid by Mulvane and allowed to him. The jury had before them full details as to the work done in the case and the interests of all the defendants, and from them they could make the necessary calculations. The jury were also fully advised as to the basis of charging fees as given by the witnesses for the defendant. (See pp. 267, 271, 272, 277 of record).

The testimony of Mr. Mulvane and his witnesses show that the attorneys employed by him were engaged to represent his interests exclusively; that in appearing for the other defendants they did so for the sole purpose of protecting Mr. Mulvane; that no charge was made against these other defendants or ever would be, and Mulvane was looked to as their client. This is very concisely stated in the testimony of A. L. Williams, page 253 of record:

"In my efforts to procure a dissolution of the injunction for Mr. Mulvane, I appeared for some of the other defendants in the case. This was done solely for the purpose of assisting in procuring a

dissolution of the temporary injunction against Mr. Mulvane, and was done in pursuance of my employment by him. I was not employed by any of the defendants in the case other than Mr. Mulvane, performed no services at their request, have never charged any of the other defendants in the case a fee for my services in that case, and never expect to."

Joab Mulvane testified upon this subject as follows:

(P. 173.) "Q. Now, you say in answer to Mr. Smith's question that you employed these attorneys to represent you, and that in representing others they did so by virtue of your employment and represented the others incidentally. What do you mean by that?

A. I mean I employed them for myself to do whatever would be necessary in the matter; and I did not employ them for anybody else.

Q. And in representing the others incidentally, do you mean by that that it was for the purpose of protecting your interests?

A. Solely; yes, sir. * * *

Q. So far as you know they did not make any charge against the other defendants for representing the other defendants in the case?

A. Not that I know of.

Q. So far as you know, did these other defendants pay these attorneys you employed for representing them in the case in any phase of it?

A. No, sir; I think not."

A. A. Hurd testified as follows, in regard to this matter:

(P. 185.) "Q. Now, Mr. Hurd, you appeared

for other defendants in the case than Mr. Mulvane. State how that happened.

A. I think possibly my name appeared as attorney for The Topeka Water Works Company; I don't know whether it did or not, the old company; I am not certain about that. I appeared for Mr. Mulvane. I did not appear for anything else. Anything I did was for the purpose of aiding Mr. Mulvane in procuring a dissolution of this temporary injunction. I was not employed by anybody except Mr. Mulvane.

Q. Then if your name, and that of Mr. Dunlap, appears representing other defendants in the case, was it solely by virtue of your employment by Mr. Mulvane?

A. Yes, sir. We were not employed by anybody else, did not consider ourselves attorneys of anybody else, and did not make any charge against anybody else."

See, also, testimony of Eugene Hagan, page 238, and of Mr. McFarland, page 248.

When the case was here before we were urging that Mr. Mulvane could also recover the fees paid by him to Silas B. Jones, an attorney directly employed by Coffin and Stanton to represent their interests. From the testimony it appears that Mr. Mulvane agreed to reimburse Coffin and Stanton for the fees of this attorney, and actually did so. Under the decision of this court we understood that these fees could not be recovered, and so made no effort to do so upon the last trial. They were eliminated from the case.

But the connection of the attorneys employed by Mr. Mulvane, with the other defendants in the case, rests upon an entirely different basis. Mr. Mulvane employed them to represent his interests and to get rid of the injunction. In appearing for the other defendants they did so entirely in the interests of Mr. Mulvane and for the protection of his rights. They were not employed by the other defendants, made no charge against them for services, and could not legally do so if they wanted to. Their services were to Mr. Mulvane and he alone was liable to them.

We do not claim that Mr. Mulvane can recover for the services rendered by his attorneys to the other defendants. We admit that he is only entitled to the amount paid by him to his attorneys for representing his own interests. And the testimony shows that that is all he did pay them.

If as a matter of fact any deductions were proper from the amounts paid by Mulvane on account of services rendered to other defendants, the jury had sufficient information before them to make the calculations. Their instructions were full and complete on this subject, and adverse party makes no complaint about them. Under the instructions of the court, and the testimony, the jury could

have allowed plaintiff the sum of $30,000. They gave a verdict for only $25,000, and it is possible that the reduction was made by the jury on account of the supposed services of Mulvane's attorneys to the other defendants.

VII.

Plaintiff's Hypothetical Question.

Plaintiff in error complains of the hypothetical question propounded by counsel for plaintiff below to the lawyers who testified as to the value of the attorneys' services in the case. The question is a long one and counsel only point out two or three specific objections. The first objection is as to that part of the question which reads as follows:

"Mr. Mulvane's financial condition was such at the time the temporary injunction was granted that, if it had been continued in force until the end of the litigation on the merits, or if it had not been dissolved within a short time after it had been granted, he would have been unable to meet his outstanding obligations and would have been bankrupted.

"To enable him to carry out his contract with Coffin and Stanton and others, and to prevent his absolute bankruptcy, Mr. Mulvane employed Eugene Hagan, J. D. McFarland and Hurd & Dunlap, lawyers of this city, for the sole purpose of preventing the allowance of the injunction and to obtain its dissolution if one should be granted."

The second objection is on account of the reference in the hypothetical question to the interest of Wescott and Hanson in the contract they were negotiating. The third objection is that the hypothetical question assumed that Mulvane was the only party in interest; "that all of the services were rendered in the dissolution of the injunction and called for no apportionment of the cost of these services between the parties defendant resisting the injunction and seeking its dissolution."

We will answer these objections in their order:

First. As to that part of the hypothetical question relating to the effect of the injunction upon Mulvane from a financial standpoint.

In the case of *Ottawa University vs. Parkinson*, 14 Kan. 162, this court through Kingman, C. J., thus stated the elements which should be considered in fixing the value of attorney's fees:

"It is claimed that the premises on which the witness based his estimate of the value of the services rendered are erroneous; that he had no right to consider 'the amount in controversy, and the legal questions involved, and the general importance of the case,' in making his judgment of the value of the services. But we think these were all proper and important elements in determining the value of the services. We know that an attorney is bound to fidelity to his client as much when

the amount is one dollar as when it is a million. His obligation is not changed. But it is in the knowledge of every professional man, that when great interests are confided to his care he is expected to use the utmost diligence in the preparation of the case. He is not expected to, nor does he limit his services by the rule of ordinary care and skill that governs him in an ordinary case. So in *Duncan vs. Yancy's Ex'rs*, 1 McCord, 149, the court held that the great value of the property in contest, and the doubtful nature of the right to be tried, were proper and important elements in determining the value of the services."

In the case of *Bentley vs. Brown*, 37 Kan. 15, this language was used:

"There were before the court the terms of employment, the character of the litigation in which the services were rendered, the manner in which the services were performed, the time occupied, *and the benefits resulting to the defendant in error from the services*. It was the duty of the court to consider all these matters in determining the value of the services."

In this case the suit was filed and a restraining order issued just five days before Mr. Mulvane was to carry out his contract with Coffin and Stanton and Woodbury and Moulton, for which he was to receive $550,000. He was prevented from doing so by the injunction obtained by complainants in that suit. The hearing upon the application for a temporary injunction was set for February 12, which was beyond the time set for the delivery

of the stock to Coffin and Stanton and Woodbury and Moulton. To enable him to gather in the capital stock of the Water Company, and thus to meet his contract, he had assumed obligations which he had a right to believe would be met and liquidated with the money he was to receive upon making delivery of the stock. If he could not deliver the stock he could not obtain the money with which to pay these outstanding obligations, and with the possibility of a temporary injunction tying up indefinitely the deal with Coffin and Stanton, financial ruin stared him in the face. Let us quote from Mr. Mulvane's testimony upon this proposition:

(P. 174.) "Q. Now, Mr. Mulvane, you spoke about being bankrupt or ruined if this temporary injunction had not been dissolved in a short time after it was granted. I wish you would state what, if any, obligations you incurred in transferring these options into actual purchases of stock after the restraining order was issued.

A. I assumed obligations by reason of this transaction in the amount of $340,000. I borrowed of the banks $27,000. I gave my notes to various persons for the purchase of stock or had my notes out for $263,000 or thereabouts. I had received from Coffin and Stanton $50,000, so that I had in this business and was liable for $340,000.

Q. And those obligations were incurred for what purpose?

A. For the purpose of carrying out my contract

with Coffin and Stanton and turning over to them the property, the stock.

Q. Well, they were incurred for the purpose of enabling you to get possession of the stock so you could comply with the contract?

A. Yes, sir.

Q. Now, Mr. Mulvane, I wish you would state to the jury whether or not you would have been able to meet those outstanding obligations if the injunction had been continued in force say until the next term of court?

A. I don't see how I could; I think I could not.

Q. How were those obligations secured, what evidence did you give of those obligations that you assumed?

A. Notes for short time.

Q. How long did they run?

A. Thirty, sixty and ninety days; mostly short periods. I think perhaps I had one or two as long as six months.

Q. What did you say the total amount of these obligations were?

A. $340,000. That is not including the $50,000 which I had of Coffin and Stanton, which I was liable to be called upon to return to them if I failed to comply with my contract, and was also liable to suit for damages.

Q. What did you have to meet these obligations in the event of being unable to collect the money due you from Coffin and Stanton and Woodbury and Moulton?

A. Well, I had no ready means; I had some property.

Q. Was it valuable enough to meet these obligations?

A. No, sir; it would not have been.

Q. To what extent could you have met these

obligations by other property which you had then at that time?

Q. Well, that is hard to answer, but I think it would have been impossible to meet the emergency.

Q. Then if this temporary injunction had not been dissolved you would have found it impossible to meet your outstanding obligations?

A. That was the feeling I had about it. I felt so and I am quite sure and satisfied that I could not have done it.

Q. Is that what you meant when you said you would have been ruined if the temporary injunction had not been dissolved?

A. Yes, sir."

Besides all this there was the possibility of a damage suit with Coffin and Stanton and Woodbury and Moulton if he was unable to carry out his contract with them. Time meant a great deal to Mr. Mulvane just then. If he had been a Vanderbilt, so that he could have waited until the termination of the suit on the merits without its having any particular effect upon his solvency, he might have gone ahead in the ordinary manner and allowed the case to take its course without making any strenuous efforts to have the temporary injunction set aside. But he was not a Vanderbilt. Practically his whole fortune was tied up in this transaction, so that if the injunction had been indefinitely prolonged he would have been unable to

meet his financial obligations, and would thus have become what we designate in general parlance, a "bankrupt." These were matters which Mr. Mulvane was in duty bound to consider in determining the course to be pursued by him in employing attorneys to defeat the injunction. He had to get rid of the injunction "quick," or he was gone. He therefore employed a large number of attorneys, hoping that their combined judgment, industry and influence would put him in a position to protect his financial standing.

Now, in considering the propriety of the employment of a considerable number of attorneys and the payment of large fees to them, did not the jury have a perfect right to take into consideration the possible results of the litigation upon Mr. Mulvane's financial standing? If as a matter of fact the long continuance of the injunction would have bankrupted him, was it not within the province of the jury to consider that fact in connection with the attorney's fees paid by Mr. Mulvane in his efforts to get rid of it? Knowing that their client might be financially ruined if their efforts were unsuccessful, and realizing that results turned upon rulings made upon preliminary motions, heavier burdens were necessarily cast upon Mul-

vane's attorneys and they had the right to charge larger fees accordingly. We refer upon this point to the case of *Selover vs. Bryant* (Mich.), 56 N. W. 58, and quote the following from the opinion:

"The only other assignments of error which we deem worthy of specific mention are those relating to the charge of the court that the value of the services (of the plaintiff) 'to Mrs. Bryant,' should be considered by the jury. There was no error in this. The court did not say that that consideration alone should be taken as the measure of value. The value of the services of an attorney is necessarily to be determined by many considerations besides the mere time visibly employed in the conduct of a suit. Among other things, the importance and results of the case are to be considered. *The importance of the cause to the client affords to some extent a measure of the skill, care, responsibility, anxiety and effort demanded of and to be borne by the attorney, and should not be disregarded in their bearing upon the question of the value of such services.* (*Eggleston vs. Boardman*, 37 Mich. 14.)"

Second. As to the reference in the hypothetical question to the interest of Wescott and Hanson in the contract.

It is claimed that this reference is not sustained by the facts. That part of the question relating to them reads as follows:

"The complainants, Wescott and Hanson, were representing other parties in the negotiations with Mr. Mulvane for the purchase of The Topeka

Water Company stock; they were not to invest a dollar of their own money in the deal, and when it came to carrying out the preliminary arrangement made upon December 14, 1889, by executing a more formal contract, the parties whom Wescott and Hanson represented refused to make the $60,000 payment in accordance with the terms of the agreement."

For the purpose of showing that this part of the hypothetical question was based upon the testimony we will refer briefly to the record.

Asa P. Potter testified, page 149 of "Exhibit A," that he was President of the Maverick National Bank of Boston; that Mr. Hanson was an employé of the bank; that Mr. Wescott was an expert in water bonds and water works; that the bank was negotiating for the purchase of the Springfield works in Missouri and that Messrs. Wescott and Hanson went west for them, Mr. Hanson to consider whether the bonds could be negotiated, and Mr. Wescott to determine whether the works could be bought at a price within Mr. Hanson's judgment. On that trip Wescott and Hanson went to several places—Topeka being one of them. They entered into negotiations with Mulvane for the purchase of The Topeka Water Works and duly reported in regard to them to Mr.

Potter. In short, Mr. Potter was kept advised of everything in connection with the negotiation.

On cross-examination Mr. Potter was asked this question:

(P. 150.) "Q. You were then, as I understand, Mr. Potter, to furnish all the money for this transaction?

A. Yes, sir."

Mr. Wescott was interrogated on pages 124 and 125 of "Exhibit A" in regard to conferences had with his so-called "associates" after the preliminary agreement of December 14th. In the conference the "associates" were informed that an agreement had been made with Mr. Mulvane and that he was to have $60,000. Mr. Wescott testified that Mr. Potter said the money was ready and he directed the cashier to pay it to Mr. Wescott and take his receipt therefor. It was after this conference that Wescott and Hanson refused to put up the $60,000 unless the stock was first turned over. On page 125 of "Exhibit A" these questions were asked:

"Q. 84. Up to the time that the agreement 'Exhibit ..' was made, being the one which you all signed, had you disclosed to Mr. Mulvane the fact that any one was associated with you in this enteprise except your co-plaintiff?

A. Yes, sir; we went over all that matter in Topeka, showing Mr. Mulvane what *we* had done

in Springfield, Mo., by the actual purchase of that plant, and that it was in practical operation, and also that *we* were in negotiation for other plants and had a syndicate of gentlemen who were connected with us, of which we were two of the principals. I gave him the address of the Casco Bank, Portland, Maine, as to my ability to carry out any agreement into which I entered.

Q. 85. I am not asking you about that, but as to anything you said to him in regard to your associates in this enterprise.

A. Yes, sir.

Q. 86. Did you name any of them?

A. I think not.

Q. 87. What is the nature of that syndicate, Mr. Wescott.

A. The nature of that syndicate?

Q. 88. Is it a corporation or a private concern?

A. A private concern.

Q. 89. Is it in the nature of a partnership?

A. No, sir; associates. For instance, a few gentlemen come together and say, 'We will purchase—gentlemen say to me, Mr. Wescott, if you will negotiate for water works and operate them, on the condition that you will buy them and operate them, we will go in with you to furnish our portion of the money with you to purchase any plants that you will recommend.' On that understanding I went ahead and purchased, as we supposed, the Springfield and also the Topeka."

From this testimony it appears that the Topeka works were to be purchased by the same parties who had purchased the Springfield works, and from Mr. Potter's testimony it seems that the

Springfield works were purchased by the bank of which he was president. It is plain from the testimony also that the bank was to furnish all the money to carry out the transaction with Mr. Mulvane; that Mr. Hanson was an employé of the bank and that Mr. Wescott was engaged by it in at least one case to act as an expert in water bonds and water works.

It is a fair inference from these facts that Wescott and Hanson were representing the Maverick Bank in this transaction and that they were not to invest a dollar of their own money in the deal.

These facts were all before the jury and we had a perfect right to embody them in our hypothetical question propounded to the experts.

The rule with reference to the facts embodied in hypothetical cases is thus stated by this court in *Medill vs. Snyder*, 58 Pac. 965:

"We find nothing substantial in the objection to the rulings on evidence. A number of extended hypothetical questions were submitted to expert witnesses, and it is contended that they did not correctly state the facts brought out in the evidence. Our examination of the record leads us to the opinion that they were within the range of the testimony offered by the parties attacking the will. While the proof in support of some of the facts was slight, 'a hypothetical question may be based upon any assumption of facts which the testimony

tends to prove according to the theory of the examining counsel.' (8 Am. & Eng. Enc. Pl. & Prac. 757.) There appears to have been some evidence sustaining the assumed facts, and we can not say that the questions were objectionable in form."

Third. As to the assumption that Mulvane was the only party in interest, etc.

In regard to this matter the hypothetical question recited the facts just as shown by the testimony. It reads as follows:

"There were other defendants in the case, and the attorneys employed by Mr. Mulvane in pursuance of such employment appeared for them, in order to better protect Mr. Mulvane's interests and prevent the allowance of the temporary injunction. They were not employed by these other defendants and made no charge for services against them. In their efforts to prevent the allowance of the temporary injunction, and to obtain its dissolution, Mr. Mulvane's attorneys filed answers and other pleadings in the case."

VIII.

The Verdict Was Not Excessive.

The verdict was no larger than it should have been. It would be difficult to find a case exhibiting a more wanton disregard of the rights of a defendant than is shown by the record in the suit of *Wescott and Hanson vs. Mulvane*. Knowing

that they had refused to comply with the terms of the contract of December 14th by making the $60,000 payment required by it, and that therefore they had no contract to enforce, and knowing, as complainants must have known long before the injunction was dissolved, that Woodbury and Moulton were necessary parties defendant, and therefore that the federal court had no jurisdiction of the cause, they nevertheless obtained and held in force an injunction which prevented Mr. Mulvane from carrying out his contract with Coffin and Stanton, involving more than half a million dollars. They resisted to the last every effort made to dissolve the injunction, and kept Mr. Mulvane in a most precarious condition and in most fearful suspense from the 5th of February until the 7th of the following April. They were advised of the extraordinary efforts he was making to get rid of the injunction; they knew of the lawyers who represented him, and they could not help but realize that in a case of that magnitude Mr. Mulvane would be compelled to pay them large attorneys' fees. Yet they clung tenaciously to their injunction.

They understood that a suit for damages would have afforded them a complete and adequate rem-

edy for any damages actually suffered, but that would not do. They wanted to tie Mr. Mulvane up and bring him to their terms. The chances were that their temporary injunction would remain in force until the end of the litigation, and that was a long ways off. Mr. Mulvane could not possibly hold out that long. The prospect of getting Judge Caldwell to take up a matter in which Judge Foster was acting was very slight, and it seemed as though it would be impossible for Mr. Mulvane to shake off the burden resting upon him, illegal though it was. A continuance of the injunction until the end of a long-winded chancery proceeding meant financial ruin to Mr. Mulvane, and with his future in their hands why should not Wescott and Hanson "put the screws to him" until he became submissive and willing to accede to conditions imposed by them. They were cruel and merciless and pursued their unfair advantage to the very end. They took great chances, but success meant large profits. Until the temporary injunction was granted and a bond filed they assumed no risk; after it was granted the prospect of bringing Mr. Mulvane to their terms seemed almost certain. Judge Foster warned them, however, of what might possibly be in store for them

when he granted the temporary injunction. This is what he said:

(P. 76 of "Exhibit A.") "Of course this may be somewhat of a risky experiment for the complainants in this case, because they have certainly got to give a bond for all damages that the parties sustain. I am rather impressed with the belief that there is a proper and adequate remedy at law; that is, I do not see any serious obstacle in the way of it myself. But yet I must concede that the complainants have the right to come in here and insist, if the law gives it to them, upon a specific performance of this contract."

But with a temporary injunction in force lasting through the litigation, Wescott and Hanson had no fear of a suit upon the injunction bond. Mr. Mulvane was in their power, and Judge Foster's warnings could not disturb their tranquillity. They were perfectly willing to have him point out imaginary dangers, *provided* he would grant them a temporary injunction.

An unexpected change took place, however—one of those inexplicable things that will happen at times, even in a lawsuit. As the result of a sort of flank movement, for which they were unprepared, the injunction was dissolved and with it the clutch which they had so long maintained upon Mr. Mulvane.

This little speculation of Wescott and Hanson cost Mr. Mulvane a sum of money which, with interest to the date of the verdict amounted to $30,000. He should have been reimbursed for every cent of it. The jury allowed him only $25,000 and he is consequently the loser by $5,000. It was no pleasure to Mr. Mulvane to be compelled to pay out these large sums of money, and it would have been much more satisfactory to him if he had found lawyers to be less expensive luxuries. But he had employed *good* lawyers—men who had the courage to charge fees in some measure commensurate with the services rendered—and he had no alternative but to pay their charges.

Now, what excuse can be given by the sureties upon the bond for not reimbursing Mr. Mulvane for these moneys actually paid out by him in good faith? They understood the nature of the obligations assumed by them, and certainly were not so foolish as to incur them without adequate security. They practically stand in the shoes of Wescott and Hanson. Wescott and Hanson played out their game at Mr. Mulvane's expense, and there is no reason why those expenses should not be made good to him.

Be that as it may, the reasonableness of the attorneys' fees charged, and of the expenses paid by Mr. Mulvane were questions for the jury and their decision upon those questions is final.

We respectfully submit that the judgment of the lower court should be affirmed.

A. L. Williams,
N. H. Loomis,
Attorneys for Defendant in Error.

No. 59.

Petition for Rehearing.

OFFICE SUPREME COURT of U. S.
RECEIVED
MAY 12 1902

Petition for Rehearing.

Rec'd May 12, 1902.

In the Supreme Court

of the United States.

A. J. TULLOCK, Plaintiff in Error,
vs.
JOAB MULVANE, Defendant in Error.

No. ~~875~~ 59.

In Error to the Supreme Court of the State of Kansas.

A. L. WILLIAMS AND
N. H. LOOMIS,
Attorneys for Joab Mulvane, Petitioner.

CRANE & CO., TOPEKA.

In the Supreme Court
of the United States.

A. J. TULLOCK, Plaintiff in Error,
vs.
JOAB MULVANE, Defendant in Error.
} No. 275.

In Error to the Supreme Court of the State of Kansas.

Petition for Rehearing.

HAVING carefully examined the opinion of the Honorable Court, we think that, with propriety, we may ask the court to consider whether this case be not one in which it will be proper to grant a rehearing to the appellee on the ground:

That the question as to whether or not attorney's fees should be allowed by a State court as a measure of damages on an injunction bond given in a Federal court, is not one arising under an "authority exercised under the United States"; that it is a question of general law upon which the decision of a State court is final and not reviewable by this court.

It is unnecessary to repeat the facts, as they sufficiently appear in the opinion of the court as well as in the dissenting opinion of Mr. Justice HARLAN.

According to the opinion of the court, "a bond given for an injunction in an equity cause in a court of the United States is to be construed with reference to the liability administered in the courts of the United States on that subject as settled by this court." Again: "For if it be true, and it undoubtedly is, that the giving of such a bond was an act done pursuant to an authority exercised under the Constitution and laws of the United States, it must follow that the bond so taken is to be interpreted with reference to the authority under which it was given and the principles of jurisprudence controlling such authority, and not by the local law."

It will be borne in mind that the jurisdiction of the State court was not brought in question, nor the validity of the bond, nor the order under which the bond was taken. Neither was there any ambiguity as to the meaning of the bond. The only question arising in connection with the bond is as to the measure of damages which should be allowed upon its breach.

As there is no act of Congress regulating the measure of damages on an injunction bond, as there was no rule of court in existence upon the subject, and as the bond itself made no provision as to the measure of damages, it follows that the point involved is one of general law, and if it is impressed with a Federal character it grows out of the fact that the bond was taken in a Circuit Court of the United States.

The position taken by the court is, therefore, substan-

tially this: That it has the power to review the decision of a State court upon the measure of damages to be allowed upon an injunction bond, given in a Federal court, even though it be conceded that the precise question involved is one of general law, upon the sole ground that the bond was taken in pursuance of an order made by a Federal court.

If this is true, it necessarily follows that this court can review *all* questions decided by a State court in connection with an injunction bond given in a Federal court, whether those questions, in themselves, present a Federal question or not.

If an appeal lies from the State court upon all questions arising in connection with an injunction bond, it ought to lie as to all questions arising in connection with suits involving the bonds of receivers appointed by United States courts, in connection with judgments rendered by such courts, in connection with the bonds of United States marshals or other Federal office-holders, in connection with all suits brought in the State courts by or against a Federal corporation, in connection with all cases in the State courts in which the parties claim under an act of Congress or a patent issued by the United States.

A judgment of a Federal court is certainly as much of an "authority exercised under the United States" as is an injunction bond. Yet this court has held time and again that all questions arising under such a judgment do not necessarily involve a Federal question which is subject to

review on a writ of error from this court to a State court. See —

Prov. Sav. Society v. Ford, 114 U. S. 635.
Carson v. Dunham, 121 U. S. 421, 428.
Metcalf v. Watertown, 128 U. S. 586.
Pope v. Louisville &c. Ry., 173 U. S. 573, 580.
Gableman v. Peoria &c. Ry., 179 U. S. 335, 340.

In the case of *Provident Savings Bank v. Ford, supra,* the court uses this language:

"What is a judgment, but a security of record showing a debt due from one person to another? It is as much a mere security as a treasury note, or a bond of the United States. If A brings an action against B, trover or otherwise, for the withholding of such securities, it is not therefore a case arising under the laws of the United States, although the whole value of the securities depends upon the fact of their being the obligations of the United States. So if A have title to land by patent of the United States and brings an action against B for trespass or waste, committed by cutting timber, or by mining and carrying away precious ores, or the like, it is not therefore a case arising under the laws of the United States. It is simply the case of an ordinary right of property sought to be enforced. A suit on a judgment is nothing more, *unless some question is raised in the case* (as might be raised in any of the cases specified), *distinctly involving the laws of the United States* — such a question, for example, as was ineffectually attempted to be raised by the defendant in this case. If such a question were raised, then it is conceded it would be a case arising under the laws of the United States."

In the case of *Metcalf v. Watertown,* 128 U. S. 588, the views of the court upon this subject are thus expressed:

"Nor can the jurisdiction of the Circuit Court be maintained upon the theory that this suit is one arising under the Constitution or laws of the United States. The fact that it was brought to recover the amount of a judgment of a court of the United States does not, of itself, make it a suit of that character; for the plaintiff, without raising by his complaint *any distinct question of a Federal nature,* and without indicating, by proper averment, how the determination of any question of that character is involved in the case, seeks to enforce an ordinary right of property, by suing upon the judgment merely as a security of record, showing a debt due from the city of Watertown."

We also quote from the opinion of this court in the case of *Gableman v. Peoria &c. Ry. Co.,* 179 U. S. 340:

"The question is whether the bare fact that the appointment of this receiver was by a Federal court makes all actions against him cases arising under the Constitution or laws of the United States, notwithstanding he was appointed under the general equity powers of courts of chancery, and not under any provision of that Constitution or of those laws; and that his liability depends on general law, and his defense does not rest on any act of Congress. We are of the opinion that this question must be answered in the negative, and that this has been heretofore so determined as the Circuit Court of Appeals properly held in this case."

In the case at bar we claim that the allowance of attorneys' fees as an element of damage does not present "any distinct question of a Federal nature"; that it is essen-

tially a question of general law; that the jurisdiction to review this question must necessarily be based upon the proposition that all questions, even though they do not present in themselves a distinct Federal question, passed upon by a State court and arising in connection with an injunction bond given in a Federal court, are reviewable in this court; and that this view of the law is contrary to reason and authority.

A Federal corporation can remove a case to a Circuit Court of the United States on the sole ground of its character as a corporation created by the United States. This is upon the theory that in the course of the litigation some question may arise involving the construction of the act of Congress creating the corporation. But suppose a railroad company created by an act of Congress is sued in the State court for personal injuries; a judgment is recovered against it which is affirmed by the Supreme Court of the State; an effort is thereupon made to have this court review the rulings of the State court in regard to what constitutes negligence and contributory negligence and the proper measure of damages. Would this court sit in judgment upon rulings of this nature made by the State court, even though the railroad company was, at the time of inflicting the injuries complained of, acting and existing under the authority of an act of Congress? We submit that this would not be done, and that the reason therefor would be that the questions presented for review were ques-

tions of general law, pure and simple, and that the conclusions of the State court with respect to them were final, notwithstanding the fact that they were made in a case against a Federal corporation.

Neither will this court review the decision of a State court in a case in which the United States is a party or interested, unless the precise question presented for consideration is one arising under the Constitution or laws of the United States. It would not review a question of general law even in such a case. This is decided in *United States v. Thompson, et al.*, 93 U. S. 586.

In the case of *Avery v. Popper*, 179 U. S. 305, this court said:

"With respect to writs of error from this court to judgments of State courts, in actions between purchasers under judicial proceedings in the Federal courts and parties making adverse claims to the property sold, the true rule to be deduced from these authorities is this: That the writ will lie, if the validity or construction of the judgment of the Federal court, or the regularity of the proceedings under the execution, are assailed; but if it be admitted that the judgment was valid, and those proceedings were regular, that the purchaser took the title of the defendant in the execution, and the issue relates to the title to the property as between the defendant in the execution or the purchaser under it, and the party making the adverse claim, no Federal question is presented — in other words, it must appear that the decision was made against a right claimed under Federal *authority*, in the language of Rev. Stat., § 709."

Again:

"This was a question either of local law or of general law. If of local law, of course the decision of the Supreme Court of Texas is binding upon us. If of general law, as it involves no Federal element, it is equally binding in this proceeding, since only Federal rights are capable of being raised upon writs of error to State courts. Conceding that, if the question had arisen on appeal from a Circuit Court of the United States, we might have come to a different conclusion, it by no means follows that we can do so upon a writ of error to a State court, whose opinion upon a question of general law is not reviewable here."

In *Blackburn v. Portland Gold Mining Co.*, 175 U. S. 571, it was held that the judgment of the Supreme Court of a State could not be reviewed simply because the case involved a contest between rival claimants of a mine under certain sections of the Revised Statutes. To the same effect are *Florida Central & Peninsular Railroad Co. v. Bell*, 176 U. S. 321; *DeLamar's Mining Co. v. Nesbitt*, 177 U. S. 523; *Shoshone Mining Co. v. Rutter*, 177 U. S. 505.

For cases in which this court has held that it will not review the decisions of State courts on questions of general law, see —

Bethel v. Demaret, 10 Wall. 537.
Delmas v. Insurance Co., 14 Wall. 666.
Rockhold v. Rockhold, 92 U. S. 130.

It is also plain that under the decision of the court in the case at bar it will be necessary for the Federal courts to allow attorneys' fees as damages in suits brought on in-

junction bonds given in the State of Kansas. This would be upon the theory that the bond is to be "interpreted with reference to the authority under which it was given and the principles of jurisprudence controlling such authority."

If this is to be the law with respect to injunction bonds, why is it not equally applicable to ordinary contracts? The principle involved is precisely the same. Yet in the case of *Myrick v. Railroad Co.*, 107 U. S. 102, this court refused to be governed by the decisions of a State court on a matter of general law which under the principles enunciated in the case at bar would have controlled the rights of the parties. We take an extract from the opinion in that case:

"Our attention has been called to some decisions of the Supreme Court of Illinois, which would seem to hold that a railroad company which receives goods to carry, marked for a particular destination, though beyond its own line, is *prima facie* bound to carry them to that place and deliver them there; and that an agreement to that effect is implied by the reception of goods thus marked. *Illinois Central Railroad Co. v. Frankenberg*, 54 Ill. 88; *Illinois Central Railroad Co. v. Johnson*, 34 id. 389.

"Assuming that such is the purport of the decisions, they are not binding upon us. What constitutes a contract of carriage is not a question of local law, upon which the decision of a State court must control. It is a matter of general law, upon which this court will exercise its own judgment. *Chicago City v. Robbins*, 2 Black, 418; *Railroad Company v. National Bank*, 102 U. S. 14; *Hough v. Railway Company*, 100 id. 213."

See also *Swift v. Tyson*, 16 Pet. 1.
B. & O. Rld. Co. v. Baugh, 149 U. S. 368.

We submit that the injunction bond in question was nothing more nor less than a contract, which was to be construed in accordance with the rules of the common law which prevailed in the State where executed and to be performed, and that in the determination of questions of common law, or general law, arising in connection with the bond, the decision of the State court is final. We submit that the same liberty of action should be accorded to State courts, on all questions of general law, as is exercised by the courts of the United States.

We take the liberty of giving an excerpt from the dissenting opinion of Mr. Justice HARLAN:

"Let it be observed that the jurisdiction of the State court, as between the parties and as to the subject-matter, is not disputed. The question before it was as to the extent of the liability of the sureties in the injunction bond. The decision of that question did not depend, in any degree, upon the Constitution or statutes of the United States. It depended entirely upon the meaning of the words of the bond, and the principles of law applicable to such an instrument. It was manifestly, therefore, a question of general law as distinguished from Federal law. Upon such a question the State court was entitled to give effect to its own views. The question could not become a question of Federal law by reason alone of the fact that the bond was executed under the authority of the Circuit Court; for, as already said, neither the *order* under which the bond was taken, the validity of the bond, nor the authority of the court was disputed. Nor could it become a Federal question because of any decision by this court in cases theretofore decided between other parties. Suppose this

court had not, prior to the trial of this case, expressed any opinion upon that question of general law. Could it then have been contended that the judgment complained of denied any Federal immunity? If not, then the Federal immunity now claimed arises entirely from the failure of the State court to take the same view of a question of general law which this court took in prior cases between other parties. There has been a wide difference of opinion between this court and some of the State courts upon certain questions of general law. But it has never been supposed that any one has such a vested interest in the views of this court upon questions of general law that he may complain of the refusal of a State court to accept those views as denying him an 'immunity' existing or belonging to him, in virtue of an 'authority exercised under the United States.' In *Winona & St. Peter Railroad v. Plainview*, 143 U. S. 371, 390, which came to this court from the highest court of Minnesota, it was said: 'The fact that the Supreme Court of Minnesota, in the present cases, did not acquiesce in the correctness of the decision of the Circuit Court of the United States, did not constitute a Federal question. Neither the Constitution of the United States nor any act of Congress guarantees to a suitor that the same rule of law shall be applied to him by a State court which would be applied if his citizenship were such that his suit might be brought in a Federal court.'

"Or, suppose two actions were brought in the Federal court (there being diversity of citizenship in each case), one on an injunction bond executed in a Circuit Court of the United States, and the other upon a like bond executed in a State court. What would be the ruling as to the measure of damages? Would the court disallow counsel fees in the first case and allow them in the second case, where the highest court of the State had established the

principle that counsel fees could be recovered? Each branch of the latter question must, upon the principles of the opinion just delivered, be answered in the affirmative. But they cannot be so answered without placing the decisions of the courts upon a question of general law, on the same basis as a legislative enactment prescribing the measure of damages in suits on injunction bonds."

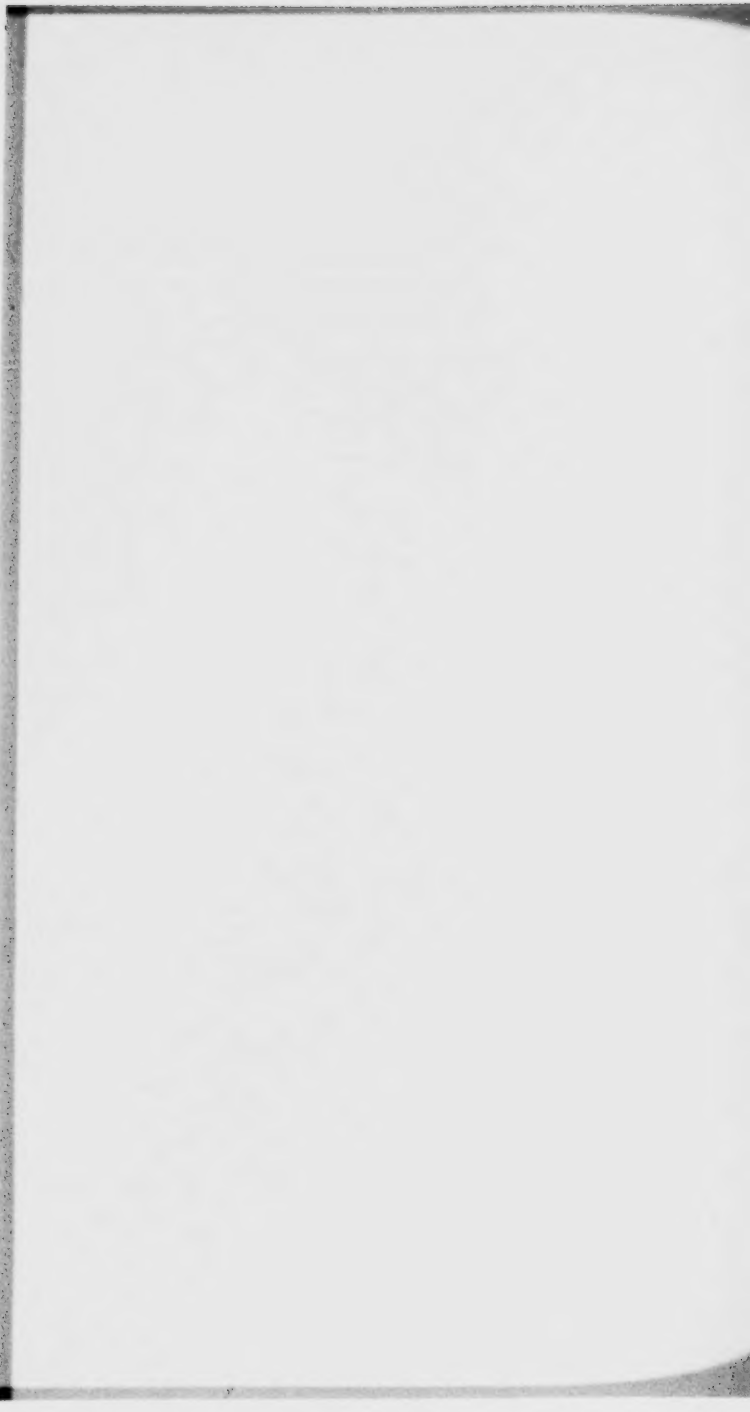
Wherefore, upon the foregoing grounds, this appellee and petitioner respectfully prays this Honorable Court to grant to it a rehearing of said cause.

A. L. Williams & N. H. Loomis

Attorneys for Joab Mulvane, Petitioner.

I, N. H. Loomis, of counsel for the appellee herein, do hereby certify that in my judgment the foregoing petition for a rehearing is well-founded, and that the same is not interposed for delay.

N. H. Loomis.



Supreme Court of the United States.

No. 59.—October Term, 1901.

A. J. Tullock, Plaintiff in Error, vs. Joab Mulvane. } In error to the Supreme Court of Kansas.

[March 3, 1902.]

George P. Wescott and Samuel Hanson were complainants in a bill in equity which was filed, on January 13, 1893, in the Circuit Court of the United States for the District of Kansas. Joab Mulvane and various other persons and corporations were made defendants to the bill. The principal relief sought was to compel the specific performance of a contract alleged to have been entered into between the complainants and Mulvane for the sale by the latter and purchase by the former of all the capital stock of the Topeka Water Supply Company, a Kansas corporation, also a defendant to the suit. Incidentally it was sought to annul a purported sale of the waterworks plant to another of the defendants, the Topeka Water Company, a Kansas corporation, which it was asserted had been organized by Mulvane. The bill also sought to prevent the Topeka Water Company from encumbering the plant with a mortgage which, it was averred, was about to be executed, and to restrain the issuing and negotiation of bonds proposed to be secured by such mortgage and the sale or disposition of stock of both the Topeka Water Supply Company and the Topeka Water Company. The members of a copartnership, styled Coffin & Stanton, doing business in the city of New York, whom it was charged were offering to the public for sale the bonds so proposed to be issued, were likewise joined as defendants in the bill.

On February 13, 1890, the court ordered a temporary injunction to issue, as prayed, upon the giving of an approved bond. Two days later, however, it was ordered that instead of a bond the complainants "may deposit with the clerk of this court the sum of $75,000 in cash, and that said deposit shall stand for a bond for all damages from the commencement of this suit until the further order of the court, whereby said complainants will be

obligated and bound to pay to the defendants all costs and damages aforesaid, if it shall be finally held that said injunction or restraining order was improvidently granted."

On April 4, 1890, upon a hearing, the court sustained a motion which had been filed on behalf of Coffin & Stanton to dissolve the temporary injunction. The dissolution was predicated upon the ruling that an indispensable party had not been made a defendant and could not be made without ousting the jurisdiction of the court, because such party defendant and the plaintiffs were citizens of the same State.

Thereafter, on June 3, 1890, by leave of court, a formal bond was substituted for the cash deposit which had been made under the order of the court previously stated. A. J. Tullock and W. M. D. Lee were the sureties. The bond recited the order for an injunction, the subsequent permission to deposit cash in lieu of a bond, the making of such cash deposit, the withdrawal of the deposit with the sanction of the court on the condition that a bond be executed. The fact that the injunction had been in the meanwhile dissolved by the court was also recited. The condition of the bond is reproduced in the margin.*

In October, 1890, pursuant to a stipulation made between complainants and certain of the defendants, filed in the cause, the bill was dismissed as to all the defendants except Mulvane, and so much of the bill as sought a specific performance of the alleged contract between complainants and Mulvane was withdrawn. By the stipulation the defendants who were dismissed from the cause expressly waived all right of action upon the injunction

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* "Now, therefore, if the said George P. Wescott and Samuel Hanson shall pay, or cause to be paid, to the said Joab Mulvane, the Topeka Water Supply Company, the Topeka Water Company, William Edward Coffin, Walter Stanton, Charles H. Jackson, and Charles F. Street, partners doing business under the firm name and style of Coffin & Stanton, and the Atlantic Trust Company, and to each of them, all damages which they, or either of them, have already sustained or may at any time sustain by reason of the granting or issuing of said restraining order, or the granting and issuing of said temporary injunction, if it shall be finally decided that said restraining order or said temporary injunction ought not to have been granted, or the withdrawing from the hands of the clerk the said sum of seventy-five thousand dollars deposited in lieu of the bond as required by the court to be given, then the above obligation shall be null and void; otherwise shall be and remain in full force and effect."

bond or otherwise, by reason of the allowance of the temporary injunction.

On September 26, 1892, upon the hearing of the cause as between complainants and Mulvane, the bill was dismissed. The case was then appealed to the Circuit Court of Appeals for the Eighth Circuit. That court decided the appeal on the assumption that the question for decision was whether, in view of all the circumstances attending the making of the agreement between complainants and Mulvane, it was one which a court of equity could specifically enforce. The court observed that the cause had evidently been argued and disposed of in the court below on the theory that under the stipulation, even though the right to have specific performance had been waived, nevertheless damages might be assessed by a court of equity as for a breach of the contract, if the court was of opinion that the appellants were, at the time the bill was filed, entitled to specific performance. Assuming, then, the regularity of this procedure, and its power as an equity court to execute the agreement, the court reviewed the evidence, and held that the complainants were not at the time the bill was filed entitled to the specific performance of the contract, for the reason that they had never put the defendant Mulvane in default by tendering him the sum which he was entitled to receive under the contract of sale, to enforce which the bill had been filed. The court further observed:

"It is assigned for error that the Circuit Court erred in dissolving the temporary injunction as well as in dismissing the bill on the ground heretofore stated. As the first of these assignments was somewhat pressed on the argument, it becomes necessary to say, and we think is all sufficient to say, that the appellants cannot be heard to complain in this court of the order dissolving the temporary injunction after voluntarily withdrawing so much of their bill as sought a specific performance of the alleged contract. An injunction could only be awarded as an incident to that species of equitable relief, and when the allegations and the prayer of the bill looking to that form of relief were withdrawn, the injunction necessarily shared the same fate."

Intermediate the dismissal of the bill by the Circuit Court and the affirmance of the decree of dismissal by the Circuit Court of Appeals, Mulvane, on November 5, 1892, instituted the present action in the State district court of Shawnee County, Kansas, against A. J. Tullock and W. M. D. Lee, the sureties upon the injunction bond above referred to. In this action recovery was sought for the sum of $75,000 as damages sustained by reason of

the injunction. Service was not made upon Lee, however, and the action was prosecuted solely against Tullock. An answer was filed, which consisted of a general denial and a plea that the action was prematurely brought because of the pendency of the appeal in the Circuit Court of Appeals.

The action in the State court was tried to a jury. Because of the ruling by the trial judge, in excluding evidence as to expenditures for attorneys' fees in procuring the dissolution of the injunction, Mulvane prosecuted error, and the judgment entered by the trial court was held by the Supreme Court of Kansas to be erroneous because of such ruling. (58 Kan. 622.)

A new trial was thereupon had in the lower court. At this trial, on the offer by Mulvane, the plaintiff, of evidence tending to show payments made by him for attorneys' fees, such evidence was objected to as follows:

"The defendant further objects because it appears that this bond was given in a proceeding in the Federal court, and under the law of the United States governing the liability of parties for damages on bonds or in such proceeding in Federal courts attorneys' fees are not included."

At the close of all the evidence, the court allowed the respective parties to amend their pleadings. The petition was amended, among other particulars, by setting out specifically the sum of asserted damage resulting from the payments alleged to have been made by Mulvane to various attorneys in resisting the allowance and procuring the dissolution of the injunction. In the amendment of the answer it was specifically pleaded that the sums paid to the attorneys by Mulvane were not elements of damage embraced within the terms of the injunction bond, if such bond was construed and enforced according to the rules applicable in the courts of the United as expounded by the Supreme Court of the United States. It was asserted that the bond must be measured by the principles controlling in the court where it was given, and that to hold otherwise would deprive the surety of the protection of the law of the United States, in contemplation of which he had contracted.

After the amendments and in negation of requests for instructions to the jury made by the plaintiff, the defendant asked the court to charge in substance as follows: 1. That as by the condition of the bond liability could not arise until it had been finally determined by the United States court, that the injunction ought

not to have been granted, the sureties upon the bond were discharged from liability by the effect of the stipulation filed in the cause in which the injunction had been granted, whereby it resulted that a final determination by the court whether the injunction ought not to have been granted was by consent of parties prevented. 2. If the stipulation had not the effect thus claimed, then at the time the action on the bond was commenced an appeal was pending in the Circuit Court of Appeals of the United States from the judgment rendered in the cause, wherein the injunction had been allowed and the bond given, and that the action upon the bond was premature. In addition, the immunity which had been previously asserted, arising from the rule governing in the courts of the United States on the subject of attorneys' fees was, in view of the pleadings and the prior proceedings in the case, reiterated by a request for an instruction that no attorneys' fees could be recovered on the bonds. All the requests of the defendant having been denied and the court having charged the jury to the contrary, a verdict was returned in the sum of $25,000, of which it may be inferred that about the sum of $20,000 was for payments which Mulvane asserted he had made on his own behalf to the attorneys who had represented his interest in resisting the allowance of and procuring the dissolution of the injunction, albeit that most of the attorneys to whom the payments in question were made were likewise attorneys of record for the other defendants who had specifically in the stipulation waived all claims of damages growing out of the injunction. From the judgment rendered on the verdict of the jury the cause was carried to the Supreme Court of Kansas, and in that court it was affirmed. (61 Kan. 650.) The opinion of the court in effect considered and disposed of the claims of alleged Federal right which have been previously referred to, and held them to be untenable. To this judgment of affirmance error was prosecuted and the cause is here for review.

Mr. Justice WHITE, after making the foregoing statement, delivered the opinion of the Court.

The assignments of error, though fourteen in number, are reducible to three propositions.

1. A contention that as the bond provided for a liability only in case it was finally decided that the injunction was wrongfully

granted, no recovery could be had upon the bond, because the stipulation between the complainants and certain of the defendants had the effect of rendering it impossible to have a final determination in the courts of the United States whether the injunction ought originally to have been granted.

2. A claim on the part of the defendant that as the bond for injunction was executed under the order of a court of equity of the United States, and therefore by an authority exercised under the United States, and as liability was only to arise when it had been finally decided that the injunction ought not to have been granted, action on the bond could not be brought pending an appeal to the Circuit Court of Appeals of the United States, and the final determination by that court of the controversy.

3. An assertion that as, by the settled rule of the courts of equity of the United States, attorneys' fees were not an element of damage covered by the terms of an injunction bond given in such court, recovery of such fees on such bond was not within the purview of the bond when construed with reference to and by the light of the authority under which the bond was given.

It is urged by the defendant in error that these contentions involve no Federal question, and that if they do they were not sufficiently set up in the lower courts, and therefore this court has no jurisdiction to review them. We dispose at once of the contention that if the propositions involve Federal questions they were not duly raised below, by referring to the statement which we have made of the case, whereby it appears that the contentions were raised below by the pleadings, by the objections to evidence and by the requests for instructions, and indeed as so raised were expressly considered and directly passed upon by both the trial court and the Supreme Court of the State of Kansas, which latter fact in and of itself suffices to present the Federal question, even if it had been otherwise ambiguously raised on the record, which is not the case. (*Oxley Stave Co.* v. *Butler*, 166 U. S. 648.)

In determining whether these Federal questions are involved, we shall for the moment take it for granted that the premises upon which such asserted questions rest are well founded, and if under such hypothesis we find that there is jurisdiction it will then be our duty to put such assumption out of view and determine the merits of the contentions.

Whilst apparently the propositions involve several distinct assertions of Federal right, in their ultimate analysis they reduce themselves to one and the same contention, that is, that a bond given for an injunction in an equity cause in a court of the United States is to be construed with reference to the liability administered in the courts of the United States on that subject as settled by this court. That this fundamental proposition embraces all the contentions would seem to be clear, when it is borne in mind that the controversy as to the stipulation and as to the pendency of the cause in the Circuit Court of Appeals assert both the generic right of the defendant to have the obligations under the bond measured and determined by the law prevailing in the courts of the United States and the claim as to the attorneys' fees propounds, but the same right as to one of the elements of damage which it was asserted the bond embraced. Whilst the unity of the propositions is thus demonstrable, as in the court below and in argument they have been separately treated and different considerations have been assumed to apply to them, we shall consider the propositions separately.

We embrace the first two contentions under one heading, as follows:

First. *Did the claim that there had been no breach of the condition of the bond because of the stipulation filed in the cause in which the bond was given and because of the pendency of the appeal in the Circuit Court of Appeals present Federal questions, and, if yes, were they well founded?*

It may not, we think, be doubted that a bond for injunction in an equity court of the United States given under the order of such court is a bond executed in and by virtue "of an authority exercised under the United States." (Rev. Stat. 709.) Certainly, the courts of the United States derive all their powers from the Constitution and laws of the United States, and their authority is therefore exercised thereunder. Being then an obligation entered into by virtue of such authority, the conclusion cannot be escaped that the defense specially set up that no liability on the bond could arise until the court of the United States in which the controversy was pending had finally determined that the injunction should not have been granted, was the assertion of an immunity from liability depending on an authority exercised under the United States, and therefore necessarily involved the decision

of a Federal question. To state the result which must necessarily flow from a contrary deduction is sufficient of itself to demonstrate the unsoundness of the reasoning by which the non-Federal nature of the question can alone be upheld. For it is clear that if it be true that the bond given in a Federal court of equity on the granting of an injunction is not to be construed with reference to the rules of law applicable to such bonds in such court, then there can be no certain general rule by which to determine the liability of the obligors upon the bond. Their responsibility would be one thing in a court of the United States and a different thing in the courts of the various States, which would imply that the parties did not contract with reference to any definite rule of liability. Indeed, the argument conduces to a conclusion which necessarily cripples the power of the court under whose order an injunction bond is executed. It is settled that such court has the inherent right to set the bond aside and to determine in its discretion whether recovery could be had upon it. (*Russell* v. *Farley*, 105 U. S. 433.) And yet if the liability upon the bond when given can be measured in courts other than the court requiring the execution of the bond, by a wholly different rule of liability from that which obtained in the court which had ordered the giving of the bond, it must follow that although the latter court had decreed that the injunction had rightfully issued, yet in an action upon the injunction bond in another forum the sureties might be made to respond in damages without hope of redress.

A reference to some of the decided cases concerning what constitutes a claim of immunity arising from an authority exercised under the United States, will serve at once to refute the contention that no Federal question is here presented.

In *Dupasseur* v. *Rochereau*, (21 Wall. 130,) the question for decision was whether a State court had given due effect to a decree of a court of the United States, and it was asserted that the contention that it had not presented no Federal question. Speaking through Mr. Justice Bradley, the court said (p. 134:)

"Where a State court refuses to give effect to the judgment of a court of the United States rendered upon the point in dispute, and with jurisdiction of the case and the parties, a question is undoubtedly raised which, under the act of 1867, may be brought to this court for revision. The case would be one in which a title or right is claimed under an authority exercised under the United States, and the decision is against the title

or right so set up. It would thus be a case arising under the laws of the United States, establishing the Circuit Court and vesting it with jurisdiction; and hence it would be within the judicial power of the United States, as defined by the Constitution; and it is clearly within the chart of appellate power given to this court, over cases arising in and decided by the State courts."

In *Factors & Traders' Insurance Company* v. *Murphy*, (111 U. S. 738,) a court of the United States sitting in bankruptcy had ordered a sale of real property of the bankrupt free from encumbrances. The property was purchased at the sale on behalf of lienholders. Subsequently one who possessed a lien on the property at the time the order was entered and sale made, brought suit in a State court of Louisiana to foreclose such lien, claiming that she had not been a party to the bankruptcy proceedings, and that her lien was unaffected by the sale. The defendant, in whose name title had been taken, while averring that the plaintiff was interested in the purchase at the sale made under the order of the United States court, insisted that the lien of the mortgage of plaintiff had been extinguished by such sale. The State court having decreed in favor of plaintiff, a writ of error was prosecuted from this court. In reversing the judgment of the State court, it was said (p. 741):

"Counsel for defendant in error deny the jurisdiction of this court and move to dismiss the writ. But it is apparent that the only controversy in the case relates to the effect to be given to the sale under the order of the District Court of the United States, to sell the mortgaged property free from incumbrance. Both parties assert rights under this order and sale. Plaintiffs in error assert that the sale as made was valid, and, being sold free from incumbrances, extinguished Mrs. Murphy's lien as well as others. Defendant asserts that it had the effect of discharging all other liens but hers, and thus gave her the exclusive, paramount lien on all the property so sold. Both the parties, therefore, rely upon rights under Federal authority, and as the right of plaintiff in error was denied by the court the writ of error lies."

In *Avery* v. *Popper*, (179 U. S. 305,) the two cases last above referred to were approvingly cited, and the rule was declared to be that where a controversy in the State court presented a contention as to the validity or proper construction of an order or decree rendered by a court of the United States, a Federal question was presented reviewable by this court (p. 314).

In *Crescent Live Stock Company* v. *Butchers' Union*, (120 U. S. 141,) the facts were briefly these: Under a bill filed in a Circuit Court of the United States, a temporary injunction had been

allowed after hearing, and a bond had been given under an order of the court, the injunction was perpetuated by the Circuit Court on the final hearing. The case was appealed to this court, and the decree of the Circuit Court was reversed. Suit was brought in a court of the State of Louisiana upon the injunction bond given in the Federal court, against the principal and surety *in solido* and against the principal alone, to recover damages for the malicious prosecution of the injunction suit in the Federal court. It was claimed by the defendants that the final decree of the Circuit Court of the United States, although subsequently reversed by this court, constituted probable cause, and therefore there could be no recovery on the alleged cause of action for malicious prosecution. Both the State trial court by way of instructions to the jury and the Supreme Court of Louisiana decided that the decree of the Circuit Court of the United States did not constitute probable cause, because prior to the decision of the Circuit Court of the United States a contrary view to that which the Circuit Court adopted had been announced by the highest court of the State of Louisiana. The jurisdiction of this court to review the controversy was challenged upon the very grounds now relied upon, and the court said (p. 146):

"It is argued by counsel for the defendant in error that this does not embrace any Federal question; that the effect to be given to a judgment or decree of the Circuit Court of the United States sitting in Louisiana, by the courts of that State, is to be determined by the law of Louisiana, or by some principle of general law as to which the decision of the State court is final; and that the ruling in question did not deprive the plaintiffs in error of 'any privilege or immunity specially set up or claimed under the Constitution or laws of the United States.' But this is an error. The question whether a State court has given due effect to the judgment of a court of the United States is a question arising under the Constitution and laws of the United States."

In *Meyers* v. *Block*, (120 U. S. 206,) the case came to this court on error to a State court, and involved the correctness of the construction by that court of the terms of an injunction bond given in a court of the United States. This court treated the matter of jurisdiction as one of course, held that the parties signing the bond must be presumed to have been cognizant of the order under which the bond was given, and to have contracted in reference thereto, and that the bond should be read in the light of the order, and the court applied to the interpretation of the bond its own views of the applicable principles of law.

The cases of *New York Life Insurance Co.* v. *Hendren,* (92 U. S. 286,) *Providence Savings Society* v. *Ford,* (114 U. S. 635,) *Blackburn* v. *Portland Coal Mining Co.,* (175 U. S. 171,) and others of like character, do not conflict with the rule which we apply in this cause, and which was expounded in the cases to which we have previously referred. This results when it is observed that none of the cases just above referred to involved the construction or effect of a law of the United States or a judgment, decree or order or other act done under and by virtue of the authority of a court of the United States or a claim of immunity thereunder.

The contention as to the prematurity of the suit presenting then a Federal controversy, the question is, Was the claim of prematurity well founded?

Previous to the bringing of the suit in the State court upon the bond, by stipulation filed in the equity cause in the United States court, upon which an order of the court was entered, the bill of complaint had been dismissed as to all the defendants but Mulvane, and it was expressly agreed that all demand for relief by way of specific performance should be withdrawn. We think that the Circuit Court of Appeals correctly decided that the necessary effect of this agreement was to withdraw from the case all controversy on the subject of the injunction. As by the stipulation Mulvane had not waived any rights of action by reason of damages caused by the injunction if any, but on the contrary his rights were expressly saved, and as the stipulation was made the basis of an order of the court which had the necessary effect to dismiss from the cause all the grounds upon which alone the rightfulness of the injunction could have been asserted, we think there was a final decision, within the import of the condition of the bond, that the injunction ought not to have been granted. As respects the argument that by reason of the execution of the stipulation, the sureties upon the injunction bond were absolutely discharged, because thereby a final determination of the rightfulness of the allowance of the injunction was prevented, we think it obvious that the sureties when executing the bond did so, subject to the right of the complainants in good faith to dismiss their bill, or to make a stipulation such as that we have referred to, which was in effect the equivalent of the dismissal of the bill in so far as all equitable relief was concerned. We are thus brought to consider the second contention, which is,

Second. *Did the claim of immunity from liability for attorneys' fees, as one of the elements of damage under the injunction bond, present a Federal question; and if yes, was it correctly decided by the court below that it was proper to award the amount of such fees in enforcing the bond?*

The first branch of this question has already been disposed of by the reasons given and authorities cited in the consideration of the proposition previously passed upon. It is insisted, however, that such is not the case, because whilst it is true the courts of the United States exercise their authority under the Constitution and laws of the United States, that, as there is no express statutory authority regulating injunction bonds, therefore in determining the measure of liability on them no claim of immunity arising from an authority exercised under the United States can arise. But this is a mere form of restating the contention we have already disposed of. The test is not the particular source, or form by which the authority of the United States has been conferred or is exerted, but whether such authority existed and was exercised and an immunity is claimed under it.

Besides, by express provision of the Revised Statutes (sec. 617) proceedings of the courts of the United States in equity causes are subject to regulation by this court, with power to modify and change such rules. And rule No. 90, promulgated under the authority thus conferred, provides as follows:

"In all cases where the rules prescribed by this court or by the Circuit Court do not apply, the practice of the circuit court shall be regulated by the present practice of the High Court of Chancery in England, so far as the same may be reasonably applied consistently with the local circumstances and local conveniences of the district where the court is held, not as positive rules, but as furnishing just analogies to regulate the practice."

And it is by the force and effect of this rule that the equity courts of the United States exercise their power with respect to the exaction of security when granting writs of injunction. (*Russell* v. *Farley*, 105 U. S. 300.)

It follows that proceedings in courts of equity of the United States are regulated by rules promulgated by this court deriving their force from statutory authority, and the argument which we have just considered, even if it were not erroneous, would be inapposite. The jurisdiction to review being then established, it remains only to consider whether the attorneys' fees were

properly allowed by the court below as an element of damages on the bond. That they were not, is settled.

In *Oelrichs* v. *Spain*, (15 Wall. 211,) this court, speaking through Mr. Justice Swayne, said (p. 230.):

"The decree of the court below was preceded by the report of a master, which the decree affirmed and followed. Upon looking into the report we find it clear and able, and we are entirely satisfied with it, except in one particular. We think that both the master and the court erred in allowing counsel fees, as a part of the damages covered by the bonds.

"In *Arcambel* v. *Wiseman*, (3 Dall. 306,) decided by this court in 1796, it appeared 'by an estimate of the damages upon which the decree was founded, and which was annexed to the record, that a charge of $1,600 for counsel fees in the courts below had been allowed.' This court held that it 'ought not to have been allowed.' The report is very brief. The nature of the case does not appear. It is the settled rule that counsel fees cannot be included in the damages to be recovered for the infringement of a patent. (*Tesse* v. *Huntingdon*, 23 How. 2 [64 U. S. XVI. 479;] *Whittemore* v. *Cutter*, 1 Gall. 429; *Stimson* v. *The Railroads*, 1 Wall. Jr. 164.) They cannot be allowed to the gaining side in admiralty as incident to the judgment beyond the costs and fees allowed by the statute. (*The Baltimore*, 8 Wall. 378 [75 U. S. XIX. 463].)

"In actions of trespass where there are no circumstances of aggravation, only compensatory damages can be recovered, and they do not include the fees of counsel. The plaintiff is no more entitled to them, if he succeed, than is the defendant if the plaintiff be defeated. Why should a distinction be made between them? In certain actions *ex delicto* vindictive damages may be given by the jury. In regard to that class of cases this court has said: 'It is true that damages assessed by way of example may indirectly compensate the plaintiff for money expended in counsel fees, but the amount of these fees cannot be taken as the measure of punishment or a necessary element in its infliction.' (*Day* v. *Woodworth*, 13 How. 370, 371.)

"The point here in question has never been expressly decided by this court, but it is clearly within the reasoning of the case last referred to, and we think is substantially determined by that adjudication. In debt, covenant and *assumpsit* damages are recovered, but counsel fees are never included. So in equity cases, where there is no injunction bond, only the taxable costs are allowed to the complainants. The same rule is applied to the defendant, however unjust the litigation on the other side, and however large the *expensa litis* to which he may have been subjected. The parties in this respect are upon a footing of equality. There is no fixed standard by which the *honorarium* can be measured. Some counsel demand much more than others. Some clients are willing to pay more than others. More counsel may be employed than are necessary. When both client and counsel know that the fees are to be paid by the other party there is danger of abuse. A reference to a master, or an issue to a jury, might be necessary to ascertain the proper amount, and this grafted litigation might possibly be more animated and protracted than that in the

original cause. It would be an office of some delicacy on the part of the court to scale down the charges, as might sometimes be necessary.

"We think the principle of disallowance rests on a solid foundation, and that the opposite rule is forbidden by the analogies of the law and sound public policy."

It is strenuously urged, however, and this was in effect the view taken by the court below, that although the rule against allowing attorneys' fees in actions on injunction bonds was thus settled by this court adverse to the right to recover such fees, as the local law was to the contrary, the injunction bond given in the Federal court must be enforced, not by the law of the forum in which it was given, but according to the rule of the local law. This proposition, again, however, but embodies the contention that the question of the allowance of attorneys' fees involved no Federal question, which has already been disposed of. For if it be true, and it undoubtedly is, that the giving of such a bond was an act done pursuant to an authority exercised under the Constitution and laws of the United States, it must follow that the bond so taken is to be interpreted with reference to the authority under which it was given and the principles of jurisprudence controlling such authority, and not by the local law. To hold the contrary, as we have previously pointed out, would be but to declare that although the power conferred by Congress upon this court to adopt equity rules is controlling, nevertheless the interpretations of the rules and the limitations which arise from a proper construction of them, as expounded by this court and enunciated in its decisions, are without avail. And this yet further points out the fallacy involved in the contention that the lower court, in passing upon the issues, decided merely a question of general law involving no Federal controversy. Now it is at once conceded that the decision by a State court of a question of local or of general law involving no Federal element does not as a matter of course present a Federal question. But where on the contrary a Federal element is specially averred and essentially involved, the duty of this court to apply to such Federal question its own conceptions of the general law we think is incontrovertible. (*Avery* v. *Popper*, 179 U. S. 305, 315.)

Whilst in the absence of authority the foregoing considerations suffice to dispose of the case, it is also effectually concluded by authority. (*Bein* v. *Heath*, 12 How. 168.) In that case, as in this, it was insisted that the local law should have been applied in

construing and enforcing an injunction bond given in a court of the United States. But the court, in negativing the contention, speaking through Mr. Chief Justice Taney, said (p. 178):

"Now, there is manifest error in subjecting the parties to an injunction bond, given in a proceeding in equity in a court of the United States, to the laws of the State. The proceeding in a Circuit Court of the United States in equity is regulated by the laws of Congress, and the rules of this court made under the authority of an act of Congress. And the ninetieth rule declares that, when not otherwise directed, the practice of the High Court of Chancery in England shall be followed. The eighth rule authorizes the Circuit Court, both judges concurring, to modify the process and practice in their respective districts. But this applies only to forms of proceeding and mode of practice, and certainly would not authorize the adoption of the Louisiana law, defining the rights and obligations of parties to an injunction bond. Nor do we suppose any such rule has been adopted by the court. And if it has, it is unauthorized by law, and cannot regulate the rights or obligations of the parties.

"And when an injunction is applied for in the Circuit Court of the United States sitting in Louisiana, the court may grant it or not, according the established principles of equity, and not according to the laws and practice of the State in which there is no court of chancery, as contra-distinguished from a court of common law. And they require a bond, or not, from the complainant, with sureties, before the injunction issues, as the court, in the exercise of a sound discretion, may deem it proper for the purposes of justice. And if, in the judgment of the court, the principles of equity require that a bond should be given, it prescribes the penalty and the condition also. And the condition prescribed by the court in this case, but which was not followed, is the one usually directed by the court.

"In proceeding upon such a bond, the court would have no authority to apply to it the legislative provisions of the State."

Indeed, the principles announced in *Bein* v. *Heath* were in effect but the reiteration of the doctrine previously established by this court, that a bond given in pursuance of a law of the United States was governed, as to its construction, not by the local law of a particular State, but by the principles of law as determined by this court, and operative throughout the courts of the United States. (*Cox* v. *United States*, 6 Pet. 172; *Duncan's Heirs* v. *United States*, 7 Pet. 435.)

It follows from what we have stated that there was error committed in allowing the recovery of attorneys' fees as an element of damage upon the bond in question. The judgment of the Supreme Court of Kansas must be reversed, and the case remanded to that court for further proceedings not inconsistent with this opinion, and

It is so ordered.

Supreme Court of the United States.

No. 59.—October Term, 1901.

A. J. Tullock, Plaintiff in Error, vs. Joab Mulvane. } In error to the Supreme Court of the State of Kansas.

[March 3d 1902.]

Mr. Justice Harlan dissenting.

This was an action in one of the courts of the State of Kansas upon an injunction bond executed in a suit in equity in the Circuit Court of the United States for the District of Kansas—the condition of the bond being that the obligors would pay or cause to be paid to the obligees and to each of them, "all damages which they, or either of them, have already sustained, or may at any time sustain, by reason of the granting and issuing of said restraining order, or the granting and issuing of said temporary injunction, if it shall be finally decided that said restraining order or said temporary injunction ought not to have been granted."

There was a verdict and judgment against Tullock, one of the sureties in the bond. Mulvane, the plaintiff, being dissatisfied with the amount of the verdict and the rulings of the trial court, prosecuted a writ of error to the Supreme Court of Kansas, where the judgment was reversed and the cause remanded for another trial. *Mulvane* v. *Tullock*, 58 *Kansas*, 622. That court said:

"That counsel fees are recoverable as damages upon an injunction bond has been the uniform holding of this court from the beginning, and this appears to be the view taken by most of the courts of the country. *Underhill* v. *Spencer*, 25 *Kan.* 71; *Loofborow* v. *Shaffer*, 28 *id.* 71; *Loofborow* v. *Shaffer*, 29 *id.* 415; *Nimocks* v. *Wolles*, 42 *id.* 39; 10 *Am. & Eng. Encyc. of Law*, 999, *and cases cited*. It appears, however, that there are some decisions of the Federal courts to the contrary, holding that the obligation of an injunction bond imposes no duty upon the obligor to pay the attorney's fees if the injunction is wrongfully obtained. *Arcambel* v. *Wiseman*, 3 *Dallas*, 306; *Oelrichs* v. *Spain*, 15 *Wall.* 211. It is contended that, as the bond was given in a case in one of the Federal courts, the obligation must be interpreted in accordance with the decisions of those courts. The claim is that the rules and decisions of the Supreme Court of the United States have the force of legislative declarations; that they enter into, and become a part of, the contract of the sureties, who can only be held liable for such consequences as are the direct result of the breach and were within

their contemplation at the time the bond was executed. No statute, however, prescribed the conditions of the bond nor limited the extent of liability thereon. It is true that it was within the general equitable power of the Federal court to prescribe the conditions upon which the injunction should issue. It could have granted an injunction without requiring a bond, or it might, in its discretion, have imposed such terms as it saw fit as a condition of granting the injunction. It did require the giving of a bond, and the bond was executed in accordance with the order of the court. The bond executed is in the ordinary form; is in the nature of a contract; and the liability of the obligors depends, not on the Federal Constitution or a Congressional act, but on the proper interpretation of the bond itself. In the absence of a statute fixing the measure of damages or limiting the recovery, we think the bond should be viewed in the light of an independent contract, and is to be interpreted by the general principles of the common law. It is not a mere incident of the injunction proceeding, nor can this, which is an ordinary action at law, be regarded as auxiliary to the proceeding in the Federal court. Being an independent contract, actionable in any State court where service upon the sureties can be obtained, the interpretation of the forum applies. As the action on the bond could be brought in the State court—and, indeed, the present action could not have been brought in any other—it cannot be said that the sureties contracted with reference to the view of the law taken by the Federal courts. They knew that the obligation was enforceable in the courts of the State of which the plaintiff and defendants were all residents, and that the highest court of that State had consistently held that counsel fees were recoverable upon an injunction bond. That the bond was given in a Federal court, where a different rule of interpretation obtains, has not been deemed to affect the State court in determining the liability upon such bond when suit was brought thereon. *Mitchell* v. *Hawley*, 79 *Cal.* 301; *H. & St. J. R'd Co.* v. *Shepley*, 1 *Mo. App.* 254; *Wash.* v. *Lackland*, 8 *id.* 122; *Aiken* v. *Leathers*, 40 *La. Ann.* 23; *Corcoran* v. *Judson*, 24 *N. Y.* 106."

In addition to *Corcoran* v. *Judson*, 24 *N. Y.* 106, cited by the State court, see *Coates* v. *Coates*, 1 *Duer*, 664, *Edwards* v. *Bodine*, 11 *Paige*, 224, and *Sedgwick on Damages*, 177; also, *Barton* v. *Fisk*, 30 *N. Y.* 171; *Behrens* v. *McKenzie*, 23 *Iowa*, 342; *Ford* v. *Loomis*, 62 *Iowa*, 588; *Cook* v. *Chapman*, 41 *N. J. Eq.* 154; *Noble* v. *Arnold*, 23 *Ohio St.* 270; *Morris* v. *Price*, 2 *Blackf.* 457; *Derby Bank* v. *Heath*, 45 *N. H.* 524; *Ryan* v. *Anderson*, 25 *Ill.* 372; *Garrett* v. *Logan*, 19 *Ala.* 344.

At the second trial Mulvane obtained a verdict and judgment which embraced his counsel fees in the injunction suit, and that judgment having been affirmed by the Supreme Court of Kansas, (61 *Kansas*, 650,) it is sought to have it reviewed by this court, under section 709 of the Revised Statutes, upon the ground that by the action of the Supreme Court of

Kansas the plaintiff in error, Tullock, was denied an "immunity" belonging to him under an "*authority* exercised under the United States." The *immunity* so claimed is that he, Tullock, was erroneously held to be liable for the attorneys' fees which the obligee in such bond paid or became bound to pay in or about obtaining or dissolving the injunction in the suit in the Federal court.

Can this court review the action of the State court upon any such a question? Is it true that the alleged "immunity" arises from an "*authority* exercised under the United States?"

In *Avery* v. *Popper*, 179 *U. S.* 305, 314, 315, this court, speaking by Mr. Justice Brown, said: "With respect to writs of error from this court to judgments of State courts in actions between purchasers under judicial proceedings in the Federal courts and parties making adverse claims to the property sold, the true rule to be deduced from these authorities is this: That the writ will lie, if the validity or construction of the judgment of the Federal court, or the regularity of the proceedings under the execution, are assailed; but if it be admitted that the judgment was valid, and those proceedings were regular, that the purchaser took the title of the the defendant in the execution, and the issue relates to the title to the property, as between the defendant in the execution or the purchaser under it, and the party making the adverse claim, no Federal question is presented—in other words, it must appear that the decision was made against a right claimed under Federal *authority*, in the language of Rev. Stat. § 709." Again: "This was a question either of local law or of general law. If of local law, of course the decision of the Supreme Court of Texas is binding upon us. If of general law, as it involves no Federal element, it is equally binding in this proceeding, since only Federal rights are capable of being raised upon writs of error to State courts. Conceding that, if the question had arisen on appeal from a Circuit Court of the United States, we might have come to a different conclusion, it by no means follows that we can do so upon a writ of error to a State court, whose opinion upon a question of general law is not reviewable here."

Surely this case does not involve a Federal immunity simply because the bond in suit was taken under the authority of the Circuit Court of the United States. If it does, then this court erred in its decision in *Provident Savings Society* v. *Ford*, 114 *U. S.* 635, (reaffirmed in many subsequent cases,) in which it was contended that a suit upon a judgment rendered by a Federal court necessarily involved questions arising under the laws of the United States. That contention was overruled. This court, speaking by Mr. Justice Bradley, said: "What is a judgment, but a security of record showing a debt due from one person to another? It is as much a mere security as a treasury note, or a bond of the United States. If A brings

an action against B, trover or otherwise, for the withholding of such securities, it is not therefore a case arising under the laws of the United States, although the whole value of the securities depends upon the fact of their being the obligations of the United States. So if A have title to land by patent of the United States and brings an action against B for trespass or waste, committed by cutting timber, or by mining and carrying away precious ores, or the like, it is not therefore a case arising under the laws of the United States. It is simply the case of an ordinary right of property sought to be enforced. A suit on a judgment is nothing more, unless some question is raised in the case (as might be raised in any of the cases specified), distinctly involving the laws of the United States—such a question, for example, as was ineffectually attempted to be raised by the defendant in this case. If such a question were raised, then it is conceded it would be a case arising under the laws of the United States."

In *Blackburn* v. *Portland Gold Mining Co.*, 175 *U. S.* 171, it was held held that the judgment of the Supreme Court of a State could not be reviewed simply because the case involved a contest between rival claimants of a mine under certain sections of the Revised Statutes. To the same effect are *Florida Central & Peninsular Railroad Co.* v. *Bell*, 176 *U. S.* 321; *De Lamar's Mining Co.* v. *Nesbitt*, 177 *U. S.* 523; *Shoshone Mining Co.* v. *Rutter*, 177 *U. S.* 505.

There is no question in this case as to the validity of any authority exercised under the United States. The only question is as to the rights of one party and the liabilities of the other party under an ordinary injunction bond. What those rights and liabilities are cannot be determined by reference to the Constitution or any statute of the United States. Nor has any rule been adopted by the Circuit Court of the United States limiting the legal effect of the words of the bond or declaring what damages should be covered by it. Of course, if Congress had enacted a statute prescribing the form of injunction bonds, and directing what liabilities should arise thereon against the obligors, that statute would control. But no such statute has been passed, and the question is left to be determined by the principles of general law.

Reference has been made to *Oelrichs* v. *Spain*, 15 *Wall.* 211, in support of the proposition that the question presents an "immunity" which exists under Federal authority. That case was brought in a Circuit Court of the United States. It does decide that attorneys' fees should not be allowed in a suit on injunction bonds. But there is in the opinion no hint even that the decision as to what damages can be allowed in such a suit rests upon a Federal ground. On the contrary, the court, after citing some authorities, says that "the principle of disallowance rests on a solid foundation, and that the opposite view is forbidden by the analogies of the law and sound policy."

We have been referred also to Equity Rule 90 of this court, which declares that "the practice of the Circuit Court shall be regulated by the present practice of the High Court of Chancery in England, so far as the same may be reasonably applied consistently with the local circumstances and local convenience of the district where the court is held, not as positive rules, but as furnishing just analogies to regulate the practice." I cannot perceive that this rule has any pertinency, as it relates merely to *practice*, and not to the principles of law by which the rights and obligations of parties to injunction bonds are determinable.

Bein v. *Heath*, 12 *How.* 168, 178, has been cited as showing that in allowing attorneys' fees the State court invaded a Federal right. That was a suit in the Circuit Court of the United States on an injunction bond taken in the same court. The trial court determined the case according to a statute of Louisiana defining the rights and obligations of the parties. This court held that "in proceeding upon such a bond, the court would have no authority to apply to it the *legislative* provisions of the State. The obligors would be answerable for any damage or cost which the adverse party sustained, by reason of the injunction, from the time it was issued until it was dissolved, but to nothing more. They would certainly not be liable for any aggravated interest on the debt, nor for the debt itself, unless it was lost by the delay, nor for the fees paid to the counsel for conducting the suit." Absolutely nothing is to be found in the opinion of the court sustaining the proposition that the rights and obligations of the parties to an injunction bond are determinable upon any principle of a *Federal* nature. The court referred to the 90th and 8th Equity rules, as furnishing authority for the *taking* of injunction bonds, but took care to say that those rules relate only to "forms of proceeding and mode of practice," and not to "the rights and obligations of parties to injunction bonds." And what was said in that case touching the rights and obligations of parties to injunction bonds was an expression of the views of the State court as to the general principles of law applicable in such cases. This is apparent from the extract given in the opinion of the court from the opinion in *Bein* v. *Heath*. In *Myers* v. *Block*, cited in the opinion in this case, 120 *U. S.* 206, 211, the court said that there was no question "as to the power of a court of equity to impose any terms in its discretion as a condition of granting or continuing an injunction." *Russell* v. *Farley*, 105 *U. S.* 433. Consequently the terms being prescribed, their meaning, in the absence of a statute, depends upon general, not Federal law.

Cases have been cited which show that this court can re-examine the final judgment of the highest court of a State which fails to give due effect to a judgment, decree or order of a court of the United States. But such cases have no pertinency to the present discussion; for in the present case

the State court did not disregard any judgment, decree or *order* of the Federal court. It did nothing more than enforce its view as to the rights and obligations of parties under a bond theretofore taken in a suit in a Federal court.

Myers v. *Block*, cited in the opinion, shows that our jurisdiction in that case was maintained solely because the case involved the question whether the injunction bonds there in suit were in conformity with the order of the Federal court in which they were taken.

In *N. Y. Life Ins. Co.* v. *Hendren*, 92 *U. S.* 287, which was brought here from the highest court of Virginia, it was said: "The case, therefore, having been presented to the court below for decision upon principles of general law alone, and it nowhere appearing that the Constitution, laws, treaties or executive proclamations of the United States were necessarily involved in the decision, we have no jurisdiction." In *United States* v. *Thompson*, 93 *U. S.* 586, which came here from the highest court of Maryland, and in which suit the United States was a party, seeking payment of a debt it held against an insolvent partnership, the court said: "It is not contended that this decision is repugnant to the Constitution, or any law or treaty of the United States; but the argument is, that, as the check of McFreely & Hopper was not paid, it did not pay their debt. Whether this is so or not does not depend upon any statute of the United States, but upon the principles of general law alone. We have many times held that we have no power to review the decisions of the State courts upon such questions. *Bethel* v. *Demaret*, 10 *Wall.* 537; *Delmas* v. *Ins. Co.* 14 *Wall.* 666; *Ins. Co.* v. *Hendren*, 92 *U. S.* 287; *Rockhold* v. *Rockhold*, 92 U. S. 130." In *San Francisco* v. *Scott*, 111 *U. S.* 268, referring to the question as to the effect of an alcalde grant of the pueblo title, and which was decided by the Supreme Court of California, it was said: "This does not depend on any legislation of Congress, or on the terms of the treaty, but on the effect of the conquest upon the powers of local government in the pueblo under the Mexican laws. That is a questions of general public law, as to which the decisions of the State court are not reviewable here. This has been many times decided."

Let it be observed that the jurisdiction of the State court, as between the parties and as to the subject matter, is not disputed. The question before it was as to the extent of the liability of the sureties in the injunction bond. The decision of that question did not depend, in any degree, upon the Constitution or statutes of the United States. It depended entirely upon the meaning of the words of the bond, and the principles of law applicable to such an instrument. It was manifestly, therefore, a question of general law as distinguished from Federal law. Upon such a question the State court was entitled to give effect to its own views.

The question could not become a question of Federal law by reason alone of the fact that the bond was executed under the authority of the Circuit Court; for, as already said, neither the *order* under which the bond was taken, the validity of the bond nor the authority of the court was disputed. Nor could it become a Federal question because of any decision by this court in cases theretofore decided between other parties. Suppose this court had not, prior to the trial of this case, expressed any opinion upon that question of general law. Could it then have been contended that the judgment complained of denied any Federal immunity? If not, then the Federal immunity now claimed arises entirely from the failure of the State court to take the same view of a question of general law which this court took in prior cases between other parties. There has been a wide difference of opinion between this court and some of the State courts upon certain questions of general law. But it has never been supposed that any one has such a vested interest in the views of this court upon questions of general law that he may complain of the refusal of a State court to accept those views as denying him an "immunity" existing or belonging to him, in virtue of an "authority exercised under the United States." In *Winona & St. Peter Railroad* v. *Plainview*, 143 *U. S.* 371, 390, which came to this court from the highest court of Minnesota, it was said: "The fact that the Supreme Court of Minnesota, in the present cases, did not acquiesce in the correctness of the decision of the Circuit Court of the United States, did not constitute a Federal question. Neither the Constitution of the United States nor any act of Congress guaranties to a suitor that the same rule of law shall be applied to him by a State court which would be applied if his citizenship were such that his suit might be brought in a Federal court."

Or, suppose two actions were brought in the Federal court (there being diversity of citizenship in each case) one on an injunction bond executed in a Circuit Court of the United States, and the other upon a like bond executed in a State court. What would be the ruling as to the measure of damages? Would the court disallow counsel fees in the first case and allow them in the second case where the highest court of the State had established the principle that counsel fees could be recovered? Each branch of the latter question must, upon the principles of the opinion just delivered, be answered in the affirmative. But they cannot be so answered without placing the decisions of the courts upon a question of general law, on the same basis as a legislative enactment prescribing the measure of damages in suits on injunction bonds.

Being unable to assent to the principle that a Federal immunity arises when a State court, in determining a question not involving the Constitution or laws of the United States nor the validity of an authority exercised

under the United States, reaches a conclusion upon a question of general law different from that announced in prior cases by this court and denying our authority to compel a State court to disregard its own views upon a question of general law, I am constrained to dissent from the opinion and judgment.

Mr. Chief Justice FULLER and Mr. Justice BROWN concur in this opinion.

True copy.

Test:

Clerk Supreme Court, U. S.